THE
INTERNATIONAL LAW
QUARTERLY

Volume 1 No. 2 Summer 1947

WILL THE JUDGMENT IN THE NUREMBERG TRIAL CONSTITUTE A PRECEDENT IN INTERNATIONAL LAW ?

By Professor Hans Kelsen, of the University of California

1. In his report to the President of the U.S. of October 15, 1946, on the Nuremberg Trial, Mr. Justice Jackson said that the rules of law applied by the International Military Tribunal in the trial of the German war criminals have been 'incorporated' into a 'judicial precedent'. 'A judgment such as has been rendered shifts the power of the precedent to the support of these rules of law. No one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law—law with a sanction'.[1] The correctness of this statement is doubtful.

A precedent is a judicial decision which serves as a model for subsequent decisions of similar cases. In order to be a precedent, the decision of a tribunal must conform with certain formal and material conditions which the judgment of Nuremberg does not fulfil.

The first condition is that the judicial decision must establish a new rule of law. This rule of law must be created by the judicial decision, not by the act of a legislative organ, or by custom, or by an international treaty (which is equivalent to legislation). It is

[1] New York Times, October 16, 1946, p. 23.

generally recognised that precedents are, beside legislation and custom, a source of law, and as such law-making acts. It is the essential function of a precedent to establish principles [2] and that means general rules of law. It is only because of the general rule of law established by a judicial decision that other judicial decisions can follow the first one, that similar cases can be decided in the same way as the first case has been decided by the precedent. It is only on the basis of a general rule that two cases can be recognised as being ' similar '. If a precedent has binding force, it is the general rule of law established by it which is binding upon the tribunals in deciding similar cases. Hence a judicial decision that merely applies a pre-existent rule of substantive law, that is to say, a judicial decision by which no new rule of law is created, cannot have the character of a precedent. If the general rule applied by a judicial decision to an individual case is identical with a general rule of pre-existent statutory or customary law, and if subsequent similar cases are decided in the same way, it is not the authority of the first decision, but the authority of the statutory or customary law, pre-existent to and applied by the first judicial decision, which directs the decisions of the subsequent cases. The most characteristic element of a precedent is its law-creating function. In so far as the law is already created by legislation, custom, or international treaty, there is no room for a precedent. It is true that judicial decisions which are considered to be precedents, frequently pretend to apply pre-existing substantive law; but, in fact, they create new law under the disguise of interpreting existing law. Only in so far as they create new law, are they true precedents.[3]

2. The judgment rendered by the International Military Tribunal in the Nuremberg Trial cannot constitute a true precedent because it did not establish a new rule of law, but merely applied pre-existing rules of law laid down by the International Agreement concluded on August 8, 1945, in London, for the Prosecution of European Axis War Criminals, by the Governments of Great

[2] Carleton Kemp Allen, *Law in the Making*, 3rd ed., 1939, p. 302.

[3] Some writers maintain that a tribunal in rendering a precedent does not really create a new rule of law but only gives evidence of an already existing rule of law. This doctrine is applied also to the other law-creating acts, such as custom and legislation. At the basis of this doctrine is the idea that positive law as established by custom, precedent, or legislation, is not the result of an original production, but of a more or less imperfect re-production of a perfect but invisible law, the archetype of positive law; the natural or objective law. This is the typical approach of the natural-law-doctrine to the problem of the sources of law, however, from a positivistic point of view, legislation, custom and precedent must be considered as true law-creating acts. Cf. my *General Theory of Law and State* (20th Century Legal Philosophy Series, Vol. I), Cambridge, Mass. (1945), pp. 126 ff. and, A. L. Goodhart, ' Precedent in English and Continental Law ' (reprinted from the *Law Quarterly Review*, January, 1934) (1934), p. 14.

Britain, the United States of America, France, and the Soviet Union. The rules created by this Treaty and applied by the Nuremberg Tribunal, but not created by it, represent certainly a new law, especially by establishing individual criminal responsibility for violations of rules of international law prohibiting resort to war. These violations are called in the Agreement 'crimes against peace' and defined as 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'. The London Agreement establishes individual criminal responsibility also for other crimes, defined by the Agreement, such as 'war crimes' and 'crimes against humanity'; but the precedentary character of the Nuremberg judgment will be discussed here only with respect to the 'crimes against peace', because it is in this respect that the problem is of foremost importance.

The treaties for whose violation the London Agreement establishes individual criminal responsibility are in the first place the Briand-Kellogg Pact of 1928, and certain non-aggression pacts concluded by Germany with States against which Germany, in spite of these treaties, resorted to war. All these treaties forbade only resort to war, and not planning, preparation, initiation of war or conspiracy for the accomplishment of such actions. None of these treaties stipulated individual criminal responsibility. For their violation the sanctions provided by general international law applied, that is to say, the State whose right was violated was authorised to resort to reprisals or counter-war against the violator. The Briand-Kellogg Pact, it is true, does provide in its preamble a special sanction for its violation; but this sanction constitutes no individual criminal responsibility. The Pact stipulates 'that any signatory power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty'. That means that all states parties to the Pact, and not only the immediate victim of an illegal war, are authorised to resort to war against a State which in violation of the Pact has resorted to war. Reprisals and war as sanctions are directed against a State as such, and not against the individuals, forming its government. These sanctions constitute collective responsibility, not criminal responsibility of definite individuals performing the acts by which international law is violated. A war waged in violation of treaties prohibiting resort to war, especially in violation of the Briand-Kellogg Pact, is certainly illegal. It is not necessarily a 'war of aggression', as the London Agreement assumes. A war of aggression is a war on the part of the State

which is the first to enter hostilities against its opponent. Such action may be legal as well as illegal. When France and Great Britain, in 1939, resorted to war against Germany without being attacked by her, their war was technically a war of aggression but in complete conformity with the Briand-Kellogg Pact, and, hence, legal. An illegal war may be called an 'international crime', and has been so called in the Geneva Protocol of 1924 for the Pacific Settlement of International Disputes, and in a Resolution of the Eighth Assembly of the League of Nations (but not in the Briand-Kellogg Pact). This term, however, does not mean—as the International Military Tribunal erroneously declares in its judgment—'that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing'.[4] This statement implies that the Briand-Kellogg Pact, according to the interpretation of the tribunal, established individual criminal responsibility for its violation. But such responsibility can be established only by a rule of international or national law providing punishments to be inflicted upon definite individuals. To deduce individual criminal responsibility for a certain act from the mere fact that this act constitutes a violation of international law, to identify the international illegality of an act by which vital human interests are violated with its criminality, meaning individual criminal responsibility for it, is in contradiction with positive law and generally accepted principles of international jurisprudence.

3. In his opening address, Mr. Justice Jackson declared: 'Any resort to war— to any kind of war— is a resort to means that are inherently criminal. War inevitably is a course of killings, assaults, deprivation of liberty and destruction of property. An honestly defensive war is, of course, legal and saves those lawfully conducting it from criminality. But inherently criminal acts cannot be defended by showing that those who committed them were engaged in war, when war itself is illegal. The very minimum legal consequence of the treaties making aggressive wars illegal is to strip those who incite or wage them of every defence the law ever gave, and to leave war-makers subject to judgment by usually accepted principles of the law of crime".[5] It is especially the defence of the

[4] Judgment of the International Military Tribunal, etc., Presented by the Secretary of State for Foreign Affairs to Parliament by Command of His Majesty Cmd. 6964, London, 1946, p. 39.

[5] This doctrine has been presented by J. W. Garner, *International Law and the World War* (1920), Vol. II, p. 472. Garner followed Renault, 'De l'application du droit pénal aux faits de guerre'. *Revue Generale de Droit International Public* (1918), Vol. 25, p. 10. Cf. my *Peace Through Law*, Chapel Hill (1944), pp. 91 ff.

act of State which, according to this doctrine, does not apply if the war, waged as an act of State, is illegal.

This doctrine implies some fundamental errors. The first is the assumption that an act loses its character as a crime under national law if it is legal under international law. That an act is 'legal' under a certain law means that no sanction is attached to it by that law. That no sanction is attached to an act and that, consequently, this act is legal under one legal system, does not prevent a sanction from being attached to this very act and that act from being illegal under another legal system; and vice versa. That international law attaches a sanction to an act and thus makes the act internationally illegal, does not preclude national law from omitting to attach a sanction to this act, so that the act remains legal under national law. That an act is illegal under international law does not necessarily imply that the act is also illegal under national law, especially under national criminal law. Breach of blockade is illegal under international law, being the condition of a sanction provided by this law; but it may be not illegal at all under the national law of the State to which the individual belongs who committed the breach of blockade. Killings, assaults, deprivation of liberty, destruction of property performed in war are no crimes under national law, not because—and only if—the war is legal under international law, that is to say, because international law does not attach to these acts, which form in their totality the action called war, one of its specific sanctions. These acts are not punishable under national law for the same reason that killing in the execution of capital punishment is not punishable under national law: because national law does not provide punishment for these acts. Acts are punishable, and that means, criminal, only under a definite—national or international—legal order. Nobody is 'subject to judgment by usually accepted principles of the law of crime', as Mr. Justice Jackson says. One is subject only to a judgment rendered by a competent court on the basis of positive criminal law. And criminal law is either the national law of a definite state, or rules of international law providing individual punishment. Whether an act which is illegal under international law is also illegal and especially criminal, under national law, and that means, under the law of a definite State, depends upon whether also the national law provides a sanction, especially a punishment for this act.

It can hardly be denied that international law prior to the London Agreement, did not provide punishment of those individuals who performed the acts of an illegal war. It is likewise undeniable that the national laws of the States which waged a war, illegal under international law, but carried out in conformity with the law of

the State concerned, do not provide punishment for those who perform the acts of such war. Only under the law of the State against which an internationally illegal war is waged could the individuals, who perform the acts of the illegal war as acts of their State, be treated as criminals, if the law of the State against which the illegal war was waged provided punishment for such acts. Since no criminal law of an existent State expressly refers to killing, assault, deprivation of liberty, destruction of property performed in an illegal war, except as acts of legitimate warfare, the punishment of these acts under national law is possible only in the way of interpretation. It stands to reason that an interpretation is excluded according to which the definitions of these crimes include acts performed in a war, which is internationally illegal but constitutionally waged by the State whose criminal law is in question. Nobody will be tried by a court of his own State for murder on the ground that he, as a soldier, has killed in warfare an enemy soldier, even if the war has been declared illegal by an international tribunal. If the criminal law of a State is interpreted as not referring to acts committed by members of the State's own army in an internationally legal or illegal war, then it is hardly possible to interpret the same law to mean that killings, assaults, deprivation of liberty, destruction of property performed in an illegal war as acts of the enemy State, are crimes. The criminal laws of all States have been established at a time when it was generally taken for granted that no State could violate international law by resorting to war, when no treaty existed outlawing war, and when the doctrine of bellum justum was almost generally rejected, so that the distinction between legal and illegal war did not play any role at all. Even after the Briand-Kellogg Pact, it is necessary to distinguish between acts of legitimate and of illegitimate warfare, and this distinction applies as well to legal as illegal wars. If the 'crimes against peace' as defined by the London Agreement and interpreted by the International Military Tribunal imply killings, assaults, deprivation of liberty and destruction of property performed in an illegal war, they refer to acts of legitimate warfare; for the acts of illegitimate warfare are covered by the concept of 'war crimes'. There is no national criminal law that refers to acts of legitimate warfare, whether performed in a legal or illegal war. Hence there is no national criminal law under which the 'crimes against peace' are punishable.

4. Even if it were possible to interpret the criminal law of a State to mean that killings, assaults, deprivation of liberty and destruction of property performed as acts of legitimate warfare in an illegal war waged by the enemy State are crimes punishable under

this law, the latter would not be applicable. For there is a rule of positive international law that excludes the application of such national law to acts of another State. It is the rule that no State can claim jurisdiction over another State, meaning jurisdiction exercised by courts of one State over acts of another State. Since a State manifests its existence only in acts of individuals performed as acts of State, jurisdiction over a State means jurisdiction of one State exercised over acts of another State. The jurisdiction excluded by this rule cannot be the jurisdiction a State exercises in reacting against the violation of its right by resorting to sanctions provided by general international law: reprisals and war, against the violator of its right; nor jurisdiction exercised by an international tribunal established with the consent of the State whose acts are subjected to the jurisdiction of this tribunal. It means only the jurisdiction exercised unilaterally by the courts of one State over acts of another State, without the latter's consent. This is the rule of positive international law which prevents that an individual be tried by a court of one State or by the common court of two or more States for having committed a delict performed as an act of another State (except with the consent of the latter).

This rule, it is true, has some exceptions. Thus, international law authorises the States to punish, through their courts, espionage committed against them (but does not oblige the States to punish espionage performed in their own interest), even if the act has been performed at the command or with the authorisation of a government, that is to say, as an act of State. But such exceptions must be established by special rules of customary or contractual international law.

5. The International Military Tribunal in its judgment, did not follow the doctrine advocated by Mr. Justice Jackson in his inaugural address. The tribunal used a somewhat different doctrine to prove that the Briand-Kellogg Pact had already established individual criminal responsibility for resorting to war in violation of the Pact. The judgment contains the following statement:

> . . . it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes,

> punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention.[6]

The jurisdiction of the military tribunals which for many years past have tried and punished individuals guilty of violating the rules of land warfare laid down by the Hague Convention of 1907 is totally different from the jurisdiction conferred upon the International Military Tribunal by the London Agreement. The military tribunals referred to in the judgment applied positive national criminal law, the law of the State which had transformed the rules of the Hague Convention—rules regulating the conduct of war—into its own criminal law. No State has, so far, transformed the rules of international law prohibiting resort to war—different from the rules of warfare—into national criminal law; and no military tribunal has, so far, tried and punished individuals for having resorted to an internationally illegal war. The military tribunals to whose practice the judgment refers, tried and punished individuals for acts of illegitimate warfare performed by them as private persons, not as act of State. The acts forbidden by the Hague Convention, it is true, may be acts of State, as well as acts of private persons performed on their own initiative, not at the command or with the authorisation of their government. However, as to its violation by acts of State, the Hague Convention constitutes only collective responsibility of the States as such.[7] Because the Convention forbids also violation of the rules of warfare by acts of private persons one may assume that general international law obliges the States to punish, in application of their own law, their own subjects, and authorises belligerents to punish subjects of the opponent, if they fall into their hands as prisoners of war, for having violated the rules of warfare, and for this purpose to adapt

[6] Judgment, p. 40.

[7] Article 3 of the Convention stipulates only that a belligerent party which violates the provisions of the regulations respecting the laws and customs of war on land 'shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'. Hence also for acts not performed at the command or with the authorisation of the government. Under general international law, a belligerent party may resort to reprisals against the enemy which has violated the Convention.

their own law to the Hague Convention.[8] A typical example of such national law is the Basic Field Manual: Rules of Land Warfare (FM 27/10), issued by the Department of War of the United States in 1940. Article 347, after enumerating the possible offences, stipulates:

> Individuals of the armed forces will not be punished for these offences in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.

Acts committed under the order or sanction of government—that is acts of State, are not punishable. Only commanders of troops, not members of the government, are punishable and only for offences not committed under the orders or sanction of their government, that is to say, as acts of State.

The differences between the Hague Convention on the rules of warfare and the Briand-Kellogg Pact is that the former can be violated by acts of State as well as by acts of private persons, whereas the latter can be violated only by acts of State. The Briand-Kellogg Pact does not—as does the Hague Convention—forbid acts of private persons. Consequently it cannot be assumed that general international law obliges or authorises the States, contracting parties to the Pact, to punish under their own law the individuals who, in their capacity as organs of a State, violated the Pact. In establishing such individual criminal responsibility the London Agreement created law not yet established by the Briand-Kellogg Pact, or valid as a rule of general international law.

It seems that the International Military Tribunal did not have great confidence in the doctrine that to punish individuals for private acts of illegitimate warfare is the same as to punish officials of States for resorting to an illegal war. For it states that the law of war

> is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.

This is not an appeal to the law that has existed 'for many years past', but to a new law adapted to a changing world. That the London Agreement is only the expression, not the creation, of this new law, is the typical fiction of the problematical doctrine whose

[8] Article 1 of the Convention only stipulates that 'the contracting Powers shall issue instructions for their armed land forces which shall be in conformity with the regulations respecting the laws and customs of war on land. . .'.

purpose is to veil the arbitrary character of the acts of a sovereign law-maker.[9]

Neither by the doctrine of the American prosecutor nor by the doctrine of the tribunal is it possible to prove that existing international law, especially the Briand-Kellogg Pact, has already established individual criminal responsibility for acts by which a State resorts to an internationally illegal war. Nor was there any national criminal law applicable to those accused of having committed the crimes against peace determined in the London Agreement. The International Military Tribunal was authorised to apply, and did apply, only the rules of law laid down in the Agreement of London. This Agreement, and no national criminal law, provided the punishment inflicted by the tribunal upon the accused persons for having committed the acts determined by the Agreement. Hence, there was no question as to whether the acts for which these persons were tried were criminal under any national law. For the tribunal they were criminal, and that means punishable, only under the law created by the London Agreement, which is the only legal basis of the judgment.

In creating the law to be applied by the tribunal, in providing for individual criminal responsibility not only for waging war in violation of existing treaties but also for planning, preparation or initiation of such war and participation in a conspiracy for accomplishment of these actions, the London Agreement has certainly created new law. But the International Military Tribunal established by this Agreement had no part in the creation of this law. Its function was limited to the strict application of the rules laid down in the Agreement to concrete cases. Apart from the individualisation of the general rules of the Agreement, which necessarily is implied in any judicial decision applying a general rule to a concrete case, there was no creative function in the judgment of the tribunal. This judgment is not a source of law in the sense a true precedent is. The source of law is the London Agreement; and it is a source of law only and exclusively for the International Military Tribunal established by this Agreement.

6. A true precedent must have binding force. That means that the general rule established by the precedent must be legally binding upon the tribunal which rendered the precedent, and upon other tribunals, inferior to it, in the decision of similar cases. There is no rule of general international law conferring upon the

[9] Cf. note 3 above. The Judgment (p. 38) expressly states: 'The Charter [as part of the London Agreement] is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, . . . it is the expression of international law existing at the time of its creation'.

decision of any international tribunal the power to render binding precedents. It is highly significant that the Statute of the Permanent Court of International Justice as well as the Statute of the International Court of Justice provide in Article 59 (identical in both Statutes):

> The decision of the Court has no binding force except between the parties and in respect to that particular case.

The decision of a court by which a new rule of law is established can be actually followed by other decisions of similar cases only if the court itself is competent to decide not only the case in which the precedent has been rendered, but also other similar cases, and if there exist other inferior tribunals having the same competence. The judgment of the International Military Tribunal does not fulfil these requirements. For this tribunal is not a permanent court and there exist no other international tribunals competent to decide similar cases. According to its Article 7 the London Agreement ' shall remain in force for the period of one year and shall continue hereafter, subject to the right of any signatory to give through the diplomatic channel one month's notice of intention to terminate it '. Even if the tribunal should be in a position to decide other cases than those decided in its judgment delivered on September 30, 1946, it could apply only the rules established by the Agreement, and not follow any rule established by its first judgment. Still more important is the fact that there exists no international tribunal competent to try individuals for having violated rules of international law prohibiting resort to war. Such tribunals may come into existence only by special treaties conferring upon them the power to inflict punishments upon definite individuals for having committed crimes as determined in these treaties. If such international tribunals should be established and inflict punishments upon definite individuals for having planned, prepared, initiated or waged an illegal war, they would and could do so only in application of the rules laid down in the basic treaties. The judgment of the Nuremberg trial would and could not be of any legal importance to their decisions. It is not superfluous to note that the only permanent international court that actually exists, the International Court of Justice, the principal judicial organ of the United Nations, is not competent at all to try individuals, since Article 34, paragraph 1 of its Statute expressly stipulates that ' only States may be parties before the Court '.

If, as within the system of international law, there is no legal rule conferring upon certain tribunals the power to establish by their decisions general rules legally binding upon this and other tribunals, if there is no possibility of a legally binding precedent,

then it is not possible to answer the question as to whether the decision of a tribunal has the character of a precedent, immediately after the decision has been rendered. The answer depends on whether or not this tribunal and other tribunals will actually decide other cases in the same way. The statement of Mr. Justice Jackson that the judgment of Nuremberg constitutes a judicial precedent, is at least premature.

7. If there is no legal rule conferring upon a judicial decision the character of a legally binding precedent, this decision has a certain chance of being followed by other decisions on condition that it is recognised as a worthy example for the decision of subsequent similar cases. This condition is usually formulated by the statement that a judicial decision will become a precedent only if the new rule embodied in it is generally considered to be just. The judgment of Nuremberg, even if it complied with all the formal requirements of a true precedent, will hardly be considered as worthy to be followed. For there are some serious objections against the appropriateness of the adjective as well as the substantive law applied by it.

The objection most frequently put forward—although not the weightiest one—is that the law applied by the judgment of Nuremberg is an ex post facto law. There can be little doubt that the London Agreement provides individual punishment for acts which, at the time they were performed were not punishable, either under international or under any national law. The rule against retroactive legislation has certainly not been respected by the London Agreement. However, this rule is not valid at all within international law, and is valid within national law only with important exceptions.[10] The rule excluding retroactive legislation is based on the more general principle that no law should be applied to a person who did not know the law at the moment he behaved contrarily to it. But there is another generally accepted principle, opposite to the former, that ignorance of the law is no excuse. If knowledge of a non-retroactive law is actually impossible—which is sometimes the case since the assumption that everybody knows the existing law is a fiction—then there is, psychologically, no difference between the application of this non-retroactive law and the application of a retroactive law which is considered to be objectionable because it applies to persons who did not and could not know it. In such a case the law applied to

[10] Cf. my article: 'The rule against ex post facto laws and the Prosecution of the Axis War Criminals' in *The Judge Advocate Journal*, 1945, Vol. II, No. 3, p. 8 ff. and 46.

the delinquent has actually retroactive effect although it was legally in force at the time the delict has been committed.

The rule excluding retroactive legislation is restricted to penal law and does not apply if the new law is in favour of the accused person. It does not apply to customary law and to law created by a precedent, for such law is necessarily retroactive in respect to the first case to which it is applied.

A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed, seems also to be an exception to the rule against ex post facto laws. The London Agreement is such a law. It is retroactive only in so far as it established individual criminal responsibility for acts which at the time they were committed constituted violations of existing international law, but for which this law has provided only collective responsibility. The rule against retroactive legislation is a principle of justice. Individual criminal responsibility represents certainly a higher degree of justice than collective responsibility, the typical technique of primitive law. Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice. Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the second World War may certainly be considered as more important than to comply with the rather relative rule against ex post facto laws, open to so many exceptions.

8. Unfortunately the London Agreement is not consistent in this respect. Its greatest merit is that it puts into force the idea of individual criminal responsibility for violations of international law and thus improves—though not in general but for some particular cases—the primitive technique of general international law with its collective responsibility. But, at the same time, the London Agreement authorises the International Military Tribunal to declare 'groups or organisations' as criminal, and confers upon the competent national authorities of any signatory 'the right to bring individuals to trial for membership therein before national, military or occupation courts'. That means that an individual

may be subjected to a criminal sanction not because he, by his own behaviour, committed a crime, but because he belonged to an association declared as criminal. That means collective criminal responsibility. The Nuremberg judgment, it is true, tries to restrict as far as possible the scope of this collective responsibility. The judgment states that punishing individuals for the crime of membership in certain organisations ' is a far-reaching and novel procedure '.[11] It states further:

> . . . the tribunal is vested with discretion as to whether it will declare any organisation criminal. This discretion is a judicial one and does not permit arbitrary action, but should be exercised in accordance with well settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided. If satisfied of the criminal guilt of any organisation or group, this tribunal should not hesitate to declare it to be criminal because the theory of ' group criminality ' is new, or because it might be unjustly applied by some subsequent tribunals.

If ' criminal guilt is personal ', how is ' group criminality ' possible at all? The judgment says:

> On the other hand, the tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished.

Consequently, the judgment states that the definition of the criminality of individuals, members of an organisation declared criminal by the tribunal

> should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation. Membership alone is not enough to come within the scope of these declarations.

However, all these principles are not laid down in the London Agreement. They are not legally binding upon the tribunals in trying individuals for the crime of membership in a criminal organisation. And the restrictions suggested by the International Military Tribunal, even if accepted by the competent tribunals, would not have the effect of substituting for the collective responsibility established by the London Agreement, the principle that members of a criminal organisation are to be punished only for actual participation in the performance of crimes determined in

[11] Judgment, pp. 66 f.

the Agreement. Only the provisions laid down in this Agreement concerning criminal organisations count; and these provisions constitute a regrettable regress to the backward technique of collective criminal responsibility, in open contradiction to the progress made by the Agreement in establishing the opposite principle in its provisions concerning crimes against peace.

9. This progress is impaired not only by the inconsistency just shown, but also by the way in which the principle of individual criminal responsibility for violations of international law has been realised. This principle, applied to acts of State, is, as pointed out, a restriction of the rule that no State has jurisdiction over the acts of another State. Consequently, it can be put into force in conformity with existing international law only with the consent of the State whose acts are placed under the jurisdiction of a national court of another State, or of an international tribunal. When the victors in the first World War intended to bring William II to trial—not for a crime against peace—but 'for a supreme offence against international morality and the sanctity of treaties', they thought it necessary to insert the provisions establishing, with retroactive force, his individual criminal responsibility for acts he performed in his capacity as organ of the German Reich into the peace treaty, signed and ratified by this State. This is the only correct way to bring into effect the principle in question on the basis of international law. Since the purpose of this principle is to guarantee the observance of international law, it should not be put into force in a way which is not in complete conformity with the very law. As to Germany the situation was rather difficult if, for some reason or another, it was not possible to obtain the consent of a German national government to the treaty establishing individual criminal responsibility for acts of the German Reich, the criminal prosecution of Germans for illegal acts of their State could have been based on national law, enacted for this purpose by the competent authorities. These authorities were the four occupant powers exercising their joint sovereignty in a condominium over the territory and the population of subjugated Germany through the Control Council as the legitimate successor of the last German Government.[12] The Control Council could have appointed a tribunal composed of Germans or neutrals, or organised in the same way as the International Military Tribunal established by the London Agreement. The Control Council could also have enacted the law to be applied by the tribunal. But, in spite of the fact that actually only German war criminals were intended to be brought to justice, another way has

[12] Cf. my above-quoted article on the Legal Status of Germany.

been chosen. The trial has not been placed on a national or quasi-national (condominium), but on an international legal basis. An international agreement was concluded—not for the prosecution of German war criminals only but ' for the Prosecution of European Axis War Criminals '. The Agreement makes no difference between Germany, whose national government had been abolished and replaced by a condominium government of the four occupant Powers, and the other European Axis States over which the Signatories had not assumed sovereign legislative power. The Agreement is an international treaty concluded not only by the four occupant Powers, but also by many other United Nations, invited in Article 5 of the Agreement to adhere to it. The tribunal is expressly designated an ' International ' Military Tribunal, and its members were not appointed by the Control Council for Germany but by the governments of the United States, Great Britain, France and the Soviet Union, with the consent, subsequently given, of the States which adhered to the Agreement. The four Signatories declared in the Preamble of the Agreement that they were acting—not as the sovereigns over the former German territory but—' in the interest of all the United Nations '. The intention to place the trial of the war criminals on an international legal basis and to create for this purpose new international law, results clearly from Mr. Justice Jackson's Report to the President of June 7, 1945,[13] as well as from his Report to the President of October 15, 1946.[14] In the latter he says of the Agreement: ' It is a basic charter in the international law of the future '. The creation of a new international law—at least with respect to the individual responsibility for crimes against peace—was legally possible only with the consent of the European Axis Powers. Although it is not of legal, but only of political, importance, it should not be overlooked that in order to ascertain that crimes against peace have been committed, the International Military Tribunal had first to ascertain that the European Axis Power concerned had violated certain treaties in resorting to war. Under general international law it is upon each contracting State to decide for itself whether a violation of the treaty has occured, if agreement as to this fact (for instance by a peace treaty) cannot be brought about. If, however, a tribunal is instituted to make individuals criminally responsible for their State's violation of a treaty, it is not exactly an improvement of general international law to establish this tribunal without the consent of the State accused of the treaty violation.

[13] New York Times, June 8, 1945, p. 4.
[14] New York Times, October 16, 1946, p. 23.

On December 20, 1945, the Control Council for Germany enacted a law concerning 'punishment of persons guilty of war crimes, crimes against peace and against humanity'. (Control Council Law No. 10.) Article 1 declares the London Agreement of August 8, 1945 an integral part of this law. It is, however, not this law of the Control Council; it is the international agreement signed at London which is the legal basis of the Nuremberg trial. It is to this agreement that the judgment refers as to the legal basis of its jurisdiction,[15] not to the law of the Control Council. The judgment refers to this law only in so far as the latter contains provisions concerning the punishment for membership of organisations declared criminal by the International Military Tribunal.[16] The law was enacted (1) 'to give effect to the terms of the Moscow Declaration of October 30, 1943, and the London Agreement of August 8, 1945, and the Charter issued pursuant thereto' and (2) 'in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, *other* than those dealt with by the International Military Tribunal' (Preamble). As to the first mentioned purpose the law was necessary since the Agreement conferred certain functions on the Control Council (in spite of the fact that its text referred not only to German war criminals). The law of the Control Council was certainly not enacted to furnish the legal basis for the Nuremberg trial.

However, in the judgment of Nuremberg the tribunal declares that 'the making of the Charter' [an intrinsic part of the London Agreement containing the rules of law to be applied by the tribunal] was 'the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered'.[17] In view of the above-mentioned facts the correctness of this statement seems to be problematical. Besides, by the Act of Military Surrender signed by the representatives of the German High Command at Berlin on May 8, 1945, no legislative power has been conferred upon the States to which the German army surrendered. It was by the Declaration made at Berlin on June 5, 1945, that the four occupant Powers—not all the States to which the German army surrendered—assumed sovereign legislative power over the former German territory and its population.

10. It must be admitted that in relation to the German delinquents the difference between a legislative act of the four occupant powers in their capacity as legitimate successors of the

[15] Judgment, p. 38.
[16] Judgment, p. 66.
[17] Judgment, p. 38.

German Government, and a treaty concluded by them and adhered to by other States belonging to the United Nations, is rather formal than substantial. And, though in the realm of law the formal aspect is essential, the objection against the Nuremberg trial arising out of this deficiency is not the most serious one. What really impairs the authority of the judgment is that the principle of individual criminal responsibility for the violation of rules of international law prohibiting war has not been established as a general principle of law, but as a rule applicable only to vanquished States by the victors. This is specially manifest by the fact that the principle laid down in the London Agreement for the punishment of European Axis war criminals has not been inserted into the Charter of the United Nations which, although supposed to be the basis of the international law of the future, still stipulates only collective responsibility of the States as such for violations of the Charter, imputable to the responsible State, not to the acting individuals.[18] And even more objectionable than the fact that the London Agreement has the character of a privilegium odiosum imposed upon vanquished States by the victors is that the tribunal established by the Agreement was composed exclusively of representatives of victorious States directly affected by the crimes over which this tribunal had jurisdiction. Not only representatives of the vanquished States, but also—what is more important—representatives of neutral States were excluded from the bench. One of the fundamental questions to be decided by the tribunal was the question as to whether Germany, in resorting to war against

[18] To insert into the Charter the principles laid down in the London Agreement an amendment to the Charter is necessary. The resolution adopted by the General Assembly on December 11, 1946, is not equivalent to such amendment. It runs as follows:

The General Assembly,

Recognises the obligation laid down by Article 13, paragraph 1, subparagraph a. of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification; and

Takes note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on August 8, 1945, and of the Charter annexed thereto, and of the fact that similar principles had been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on January 19, 1946.

Therefore

Affirms the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal;

Directs the Committee on the codification of international law established by the resolution of the General Assembly of December, 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal (*Journal of the General Assembly*, No. 75, p. 945).

Poland and the Soviet Union, violated international treaties concluded with the States whose representatives formed the court. Thus these States made themselves not only legislators but also judges in their own cause. Among the States whose representatives were the judges and prosecutors in the Nuremberg trial was one which had shared with Germany the booty of the war waged against Poland, a war declared by the tribunal, in conformity with the London Agreement, as a crime against peace because waged in violation of a non-aggression pact. It was the State which, in addition to this, committed exactly the same 'crime' in resorting to war against Japan in violation of a still existing non-aggression pact. If the principles applied in the Nuremberg trial were to become a precedent—a legislative rather than a judicial precedent—then, after the next war, the governments of the victorious States would try the members of the governments of the vanquished States for having committed crimes determined unilaterally and with retroactive force by the former. Let us hope that there is no such precedent.

TORTS IN PRIVATE INTERNATIONAL LAW[1]

By Prof. R. K. Kuratowski, of the Polish Bar
and of Lincoln's Inn, Barrister-at-Law

An attempt is made here to give a comparative study of some general ideas prevailing in the European Continental systems of private international law with regard to torts. Special attention is given to the laws of France, Germany, Italy, Poland and Switzerland, but occasionally the laws and doctrines of Continental Europe are compared with those of England and the United States.

Problems relating solely to specific torts, such as defamation, trespass, torts in aircraft or by aircraft, maritime torts and torts connected with the employment or in the course of employment are not dealt with in this article.

PROBLEMS OF CHARACTERIZATION

There is no term which corresponds to the English term 'tort' in French, German or in Polish and other Slav languages. And although etymologically the English wrong termed 'tort' is the equivalent of the French 'tort'[2] the legal term 'tort' is unknown in French law. The same obligations which arise from torts in English law will be generally classified as arising from delicts, or quasi-delicts in French law. In the German language and in Slav languages they will be termed delictual or quasi-delictual obligations, and more often obligations arising from 'non-permitted acts'. Many obligations which in England are considered as arising from torts will be treated in the law of Continental Europe as arising from contracts. The same set of facts which create a tortious liability in England or in the United States may in Continental Europe create a responsibility arising also out of 'non-permitted acts', from delicts, from quasi-delicts, and from so-called 'legal obligations'.[3]

How will a judge in Continental Europe treat an act committed

[1] This article in an abbreviated form was delivered as a lecture at All Souls College, Oxford, on May 28, 1946.

[2] Comp. Sir John Salmond, *Jurisprudence*, p. 466, London, 1947.

[3] In England the same set of facts may create an alternative tortious or contractual liability, comp. H. B. Grant 'Election at Common Law', *Law Quarterly Review*, 1946, p. 25; a typical illustration is that of an injury to a passenger or chattel in transit, which provides the alternative remedies of contract or tort.

in England and considered in England as a tortious act? Will he treat it as a tortious act in the meaning of English law or will he apply his national criteria to such an act?

The answer is of practical importance, and not merely of theoretical interest. For example, a wrong is committed in England which under English law is a tort, but a breach of contract under Polish law. If the Polish court qualifies the act as a breach of a duty primarily fixed by the law, in cases where the duty exists towards persons generally and when its breach is redressible by an action for unliquidated damages (alias 'tort'[4]), then according to the Polish rules on conflict of laws, the proper law in the case will be English law; if the Polish court qualifies the act as a breach of contract, then according to the same Polish rules, the proper law may be the Polish Code of Obligations.[5]

Here the problem arises of primary classification in the sense of allocation of the issue to its correct legal category, known also under the name of problem of characterization,[6] and in Continental Europe also termed 'qualification'.

There are no statutory rules governing the solution of the problem, but the principle generally admitted by the courts and by the majority of writers is that the lex fori governs the primary classification.

In many decisions, and among them one of January, 1943, the French courts have expressed the view that they are only bound to adopt the French classification (qualification), and that they do not need to be concerned with the classification of any foreign law.[7]

In Germany the matter of qualification (classification) of delicts, quasi-delicts and non-permitted acts (or omissions) has been carefully considered by the jurists. In overwhelming majority they apply the lex fori to the classification (qualification).[8]

[4] Definition of tortious liability by P. H. Winfield, *A Text-Book of the Law of Tort*, 1946, p. 5.

[5] See Art. 9 of the Private International Law of 1926.

[6] Comp. G C. Cheshire, *Private International Law* (1938), pp. 25 and 30, and W. E. Beckett, *The Question of Classification* ('*Qualification*') *in Private International Law*, B.Y.I.L., Vol. 15 (1934), pp. 46–81.

[7] The Cour de Paris in 1.Ch.9, 1943: 'In cases of conflict of qualification it is necessary to admit that the only legislation which matters is the French legislation'. Comp. also Tribunal de la Seine 27.4.1933; Tribunal de Metz 20.5.1931; Cour de Lyon 3.2.1932; Cour de Cassation civ. 30.11.1938; Tribunal de la Seine 1.Ch. 24.4.1931, quoted by J. P. Niboyet, *Traité de droit international privé français*, Vol. 3, p. 359 and *seq.* This point of view of the courts and of the majority of French writers is supported also by Niboyet, see *ibid.*, p. 348. Comp. also the same doctrine in its application to the qualification of delictual and contractual liability: H. et L. Mazeaud, *Traité theorique et pratique de la responsabilité civile delictuelle et contractuelle*, Vol. 3, 1939, No. 2235–2.

[8] *E.g.*, H. Lewald: 'The legal systems of the *lex loci actus* cannot impose to the German judge its qualification' (*Das deutsche Internationale Privatrecht*

The German Supreme Court shares the point of view of the doctrine [9] which can be considered as generally admitted.[10]

The same doctrine is accepted in Italy,[11] Poland [12] and Switzerland.[13]

Thus it seems clear that when an obligation arising from a tort committed in England (or in the United States) is in issue in the courts of these European countries, such obligation is classified (qualified) in conformity with the internal rules prevailing in these countries. In the immense majority of cases such obligations will be treated as arising from delicts, from quasi-delicts or from non-permitted acts (or omissions), occasionally as arising from breaches of contracts and (probably) even less occasionally as arising from breaches of personal family duty, legal duty, etc.

We are only interested in cases where an obligation which, under the lex loci is an obligation arising from a wrong, is considered by the lex fori as an obligation arising from a delict, a quasi-delict or from a non-permitted act. The problem of the choice of the proper law with regard to other obligations is beyond the scope of the present article.

GENERAL RULE: LEX LOCI DELICTI COMMISSI—THE PROPER LAW

There are only a few statutory texts dealing with the problem of the choice of the proper law as to the effects of wrongs committed abroad.[14]

auf Grundlage der Rechtssprechung, Leipzig, 1931, para. 394); E. Frankenstein: 'It is unimportant which qualification is given by the foreign law to the transaction (*Tatbestand*) and it is unimportant to know if such foreign law considers the act as a delict or as a legal obligation or as a contractual obligation; the only applicable qualification (in German courts) is the qualification of German law' (*Internationales Privatrecht*, Vol. 2, Berlin, 1929, p. 376; comp. also v. Staudinger and Rappe, *Kommentar zum Bürgerlichen Gesetzbuch und das Einführungsgesetz*, Vol. 6, p. 208, p. 225, etc.).

[9] See RG. 138, 245, quoted by Martin Wolff, *Internationales Privatrecht*, Berlin, 1933, p. 35, and RG. 95, 164; RG. 136, 363; RG. 145, 85, quoted by A. F. Schnitzer, *Handbuch des Internationalen Privatrechts mit besonderer Berücksichtigung der Schweizerischen Gesetzgebung und Rechtssprechung*, Vol. 1, Basel 1944, p. 99.

[10] But there is no unanimity, *e.g.*, Martin Wolff rejects that doctrine (*op. cit.*, p. 35; comp. also his *Private International Law*, Oxford, 1945, para. 138–157).

[11] Comp. Schnitzer, *op. cit.*, 1st ed., 1931, p. 57.

[12] Comp. L. Babinski, *Private International Law*, Vol. 1.

[13] Comp. Schnitzer, *op. cit.*, Vol. 1, p. 94 and the decisions of the Supreme Swiss Court (Bundesgericht): 59.II.17; 62.II.125; 59.II.398.

[14] One of the oldest seems to be the Greek law of 1856 under which obligations arising from non-permitted acts were governed by the lex fori. (See A. M. Makarow, *Das Internationale Privatrecht der europäischen und aussereuropäischen Staaten*, Berlin, 1929, p. 55). Since 1946 a new Greek Civil Code is in force which provides: 'The obligations arising from an unlawful act are governed by the law of the country in which the unlawful act was committed' (Art. 26) (This text was supplied to me by the kindness of Prof. J. Zepos, Athens).

The first Draft of the Introductory Law to the German Civil Code of 1896 contained an article under which obligations arising from non-permitted acts were to be governed by the lex loci delicti commissi.[15] The proposed provision was not accepted by the Legislature but a rule negative in character was embodied in Article 12 of the law: 'No broader claims are maintainable against a German for a non-permitted act committed in a foreign territory than claims which are maintainable according to German laws'.

The Polish Act on Private International Law of 1926 provides that 'obligations ex delicto and obligations resulting from other legal events are governed by the law of the State where the act occurred which was the cause of the obligation; the same law determines whether a person with a restricted personal capacity is responsible for the inflicted damage'.[16]

There was no statutory provision in Italy until recently, but an Act of 1938 on the 'General Application of Laws' provided that 'obligations not arising from contracts are determined by the law of the place where the act occurred from which they arise'.[17] This enactment did not introduce any change into Italian law: Udina writing in 1933 stated that obligations arising from unlawful facts, *i.e.*, from delicts or quasi-delicts are governed by the law of the place where the act which constituted the delict of quasi-delict happened.[18]

The French and Swiss legislations do not contain any texts specifically devoted to the choice of the proper law applicable to obligations arising from delicts and quasi-delicts committed in a foreign country. French and Swiss lawyers are inclined to apply the lex loci commissi.

'In principle—says Bartin—it belongs to the local law to decide the question of the actor's (agent's) liability, and this independently of the provisions of the personal law of the victim; the local legislator is the master here. I would not hesitate to apply the rules of French internal law to a German victim or to a German perpetrator of a civil delict or of a quasi-delict when committed in France; and I would accept the exequatur in France of a judgment given in Germany in favour of the victim, independently of the personal law against a German perpetrator of a wrongful act which was committed in Germany. The lex loci, and only the lex loci is the

[15] See Frankenstein, *op. cit.*, Vol. 2, p. 379.
[16] Art. 11 and similar provisions of the Polish Private Interprovincial Law of 1926, but the word 'state' is replaced by the word 'place' (Art. 12).
[17] Art. 15, see L. Franchi, *Cinque Codicie*, 1937, with supplement.
[18] A. Udina, *Elementi di diritto internazionale privato italiano*, Rome, 1933, p. 216. See also G. Diena, 'La conception du droit international en Italie, *Recueil des Cours de l'Academie de Droit International*', 1927, Vol. 17, p. 384.

proper law to determine whether the act amounts to a civil delict or a quasi-delict, and to determine the civil liability'; and this—as Bartin calls it—unquestionable doctrine, has been applied by the French courts.[19]

'In matters of delicts or quasi-delicts', states Pillet, 'the principle is firmly established: the responsibilities arising from acts of such a kind are to be appreciated in conformity with the law of the place where the act was committed. The same law will govern the notion of the delict and will be decisive in order to state whether the act has caused illegal damage. The territorial law will also determine the limits of liability for acts committed by third persons and the consequences of such liability. It is clear', he continues, 'that the prevalence of the territorial law is justified only where we are in presence of an obligation arising from a delict; it is necessary to distinguish contractual culpability and delictual culpability; in the first case liability will be determined by the law by which the contract itself is governed'.[20]

In Switzerland it is generally accepted that the obligations arising from delicts or quasi-delicts are governed by the lex loci delicti or quasi-delicti commissi. The Swiss theory and the Swiss courts support the view that torts and quasi-torts are determined by the lex loci actus (locus delicti commissi); the law of the place of commission is also decisive as to whether such claims may be assigned and upon what grounds the cause of action abates.[21]

The Swiss Supreme Court held that 'with the exception of the criminal punishment to be given in case of unlawful acts, public interests are no more affected by the legal relationship of the guilty to the injured party than they are in determining the legal results of a breach of contract; . . . the more recent doctrine has declared in favour of the application of the law of the place of the act in regard to the results of the tort in civil law'.[22]

The rule generally admitted in Germany is that the creation and the extent of liability for non-contractual wrongs is governed by the law where the alleged wrong was committed. The German Supreme Court (Reichsgericht) held that the lex loci actus determines whether an act is a non-permitted act; that the same law

[19] E. Bartin, *Principes de droit international privé*, Vol. 2, 1932, p. 397, and *seq.*

[20] A. Pillet, *Traité pratique de droit international privé*, Vol. 2, 1924, p. 312, and *seq.* Comp. also J. P. Niboyet, *Manuel de droit international privé*, 1928, No. 490. See also Trib. civil de Strassbourg, 28.1.1929, *Journal Clunet*, 1929, p. 1131 with a note of M.Nast (p. 1136) approving the decision and quoting other French writers who share the theory.

[21] Comp. F. Meili, *International Civil and Commercial Law*, transl. by A. A. Kuhn, New York, 1905, para. 128; Schnitzer, *op. cit.*, Vol. 2, p. 542, and the Swiss decisions: BG. 66.II.165 from Oct. 30, 1940, and other decisions quoted in the 1st ed., p. 288.

[22] Meili, *op. cit.*, quoted as H.E. XI, p. 197, translation by A. A. Kuhn.

determines the capacity of the wrongdoer, the exclusion of liability in case of self-help and the effects of the contributory fault of the victim of the wrong; that the same law determines who has the right to claim damages and the measure of damages.[23]

The German Supreme Commercial Court has similarly held that the question how far a person is liable for a wrong committed by a third person is also determined by the lex loci actus.[24] And when a German domiciled in Germany drove his motor car on a road in Austria and injured another German domiciled in Germany, the German Supreme Court applied Austrian law and not German law.[25]

The majority of doctrine in Germany supports this point of view of the Supreme Court.[26]

Thus the general principle prevailing in the Continental systems referred to is that the lex loci delicti commissi is the proper law to determine the effects of wrongs committed abroad. The same general principle prevails also in the United States, where the creation and the extent of tortious liability is governed by the law of the place where the alleged tort was committed.[27]

In England the law of the place of the wrong is an important factor in determining the responsibility for a wrong committed abroad; an act is not actionable in England if it is justifiable by the law of the place where it has been committed. And secondly—and here English law differs from laws already quoted—the wrong must be of such a character that it would have been actionable if committed in England.[28] [29] [30]

[23] As quoted by H. Lewald, *Das deutsche internationales Privatrecht auf Grundlage der Rechtssprechung*, Leipzig, 1931, para. 324: R.G. 1.7.1896; R.G. 12.3.1906.

[24] Quoted by Lewald, *ibidem*, 19.1.1878 (Vol. 23, p. 174).

[25] See RG. VII, 14.6.1915, quoted by Frankenstein, *op. cit.*, p. 376. And vice versa, when an Austrian has suffered injury in an Austrian train in Bavaria, the Austrian Supreme Court held that the claim against the Austrian Railway Administration is to be determined by the German law (decision of 2.11.1910, quoted by Frankenstein, *ibidem*). And when a motor accident occurred in the Saar territory—where the German Code was in force a French court applied the German law (Cour de Colmar, 29.5.1934, *Journal Clunet*, 1936, p. 626).

[26] *E.g.*, Staudinger Rappe, *op. cit.*, p. 194; Lewald, *op. cit.*, para. 324; Wolff (Germ.), *op. cit.*, p. 101.

[27] *E.g.*, see H. F. Goodrich, *Handbook of the Conflict of Law*, St. Paul, 1938, p. 219; *Restatement of the Conflict of Laws as adopted and promulgated by the American Law Institute*, Washington, 1934, p. 453 and *seq.*

[28] *E.g.*, see Cheshire, *op. cit.*, p. 296, and *seq.* These principles of English law prevail also in Canada (see a recent decision in *McLean* v. *Pedigrew*, 1945) and other decisions quoted by Dean J. D. Falconbridge, 'Torts in the Conflict of Laws', *The Canadian Bar Review*, 1945, p. 309, and *seq.*

[29] Damages to foreign immovables cannot be recovered in England (see Cheshire, *op. cit.*, p. 305 and 539); but see a recent decision of the Court of Appeal in *Re Tolten*, Times Law Reports, Vol. 62, p. 378. In U.S.A.—says Goodrich —'by what is still the numerical weight of authority . . . an action for

If the act is actionable under the English law and is not justifiable under the lex loci of the wrong, the English conflict rule ordains the application of English municipal law, and not that of the lex loci delicti; this is another important difference between English law and the other laws quoted here.[31]

RESTRICTIONS OF THE APPLICATION OF THE LEX LOCI [32]

When an English lawyer excludes the application of a foreign law on the ground that this law is repugnant to the distinctive policy of English law [33] his Continental colleagues apply other maxims for the same purpose.

The lex loci delicti commissi is not applied in France wherever

trespass to land is considered local and may only be brought where the land lies; there is vigorous dissent and frequent reluctance on the part of the courts to apply the rule ' called by Goodrich ' an arbitrary doctrine ' (*op. cit.*, p. 229).

[30] In Japanese law the lex loci actus prevails with the restriction that no obligation can arise in Japan from an act committed abroad which is in Japan considered to be a lawful act (Art. 11 of the Law on the Application of Legal Provisions, 1898, see Makarow, *op. cit.*, p. 84). No doubt that these provisions were influenced by English law.

[31] See Wolff (Engl.), *op. cit.*, para. 476. In *Machado* v. *Fontes*, [1897] 2 Q.B. 231, Rigby, L.J., said : ' it is not really a matter of any importance what the nature of the remedy for a wrong in a foreign country may be. The remedy must be according to the law of the country which entertains the action '. Cheshire is of the opinion that in principle the lex loci should measure the remedy and he finds some support of his view in two decisions of the Privy Council of 1923, [1923] A.C. 113 and [1923] A.C. 120. The fact that the tort was committed in England and that the case might be tried in England and might be within the jurisdiction is not necessarily a sufficient reason for allowing leave to be given to serve the writ out of the jurisdiction; if there is no question of substance in England and the plaintiff's substantial complaint is one which ought to be investigated in a foreign country, an order for service out of the jurisdiction will not be made (see *Kroch* v. *Rossell & Co.*, [1937] 1 All E.R. 725; 183 L.T. 170). For the exposition of different theories of tortious liability in private international law see also M. Schmitthoff, *A treatise of the Conflict of Laws*, 1945, p. 142 and *seq.* For a critical analysis of English rules see A. H. Robertson, ' The choice of law for tort liabilities in the Conflict of Laws ', *Modern Law Review*, 1944, pp. 27–44. It may be added that the principle of applicability of the lex loci delicti was adopted in a Draft of Resolution prepared by the Institut de Droit International (to which Westlake contributed) (Annuaire, 1908, Vol. 22, p. 62), and by the recent Treaty on International Civil Law signed at Montevideo in 1940 by Uruguay, Colombia, Bolivia, Argentina, Peru and Paraguay (art. 43 in English translation by J. I. Puente and G. L. Williams provides that ' obligations which originate apart from any agreement are governed by the law of the place where the lawful or unlawful act that gave rise to such obligation took place, and, if necessary, by the law which regulates the corresponding judicial suits '—*American Journal of International Law*, 1943, Offic. Docum., p. 147). In that respect the Treaty followed the Codigo Bustamante (arts. 167 and 168, see Makarow, *op. cit.*, p. 410) and the Montevideo Convention of 1889 (art. 38, see Makarow, *op. cit.*, p. 273).

[32] Restrictions of the application of the lex loci resulting from the formal rules of courts procedure are omitted in this article.

[33] ' The plaintiff must take the judicial machinery at the *forum* as he finds it, and if it is inadequate to grant relief he cannot recover '—comp. G. W. Stumberg, *Principles of Conflict of Law*, Chicago, 1937, p. 180

the result will conflict with the French ordre public.[34] The Swiss courts exclude the application of foreign law if such application would lead to a result incompatible with the Swiss notions of morality and equity.[35]

Under the new Italian law a provision in a foreign law is not applicable in Italy when it is contrary to public order or to bonos mores.[36]

The Polish codification of 1926, evidently made under the influence of those who advocated the necessity of differentiation between public order in internal and in international matters, provides that the foreign law is not applicable in Poland when it is in conflict with the basic principles of public order in Poland or with bonos mores (Art. 38).

In Germany the application of a foreign law is excluded if such application would produce a result contrary to bonos mores or incompatible with the 'purpose of a German law'.[37]

It would be useless to try to find a definition of such terms as 'public order', 'international public order', 'purpose of national law', etc. These terms, or rather their vagueness, leave a large discretion to the courts of one nation to exclude the application of foreign legal rules when these rules are different from the rules of the lex fori. An extensive interpretation of these terms may practically exclude the application of the foreign law; and when it is said that the lex loci delicti commissi is applicable to wrongs committed abroad, it is always necessary to have in mind the possible restriction of applicability of such a foreign law resulting from the doctrine of public order and from similar doctrines.

The exclusion of foreign law may lead to a double result: (1) an act considered as a tort in a foreign country may be considered in the country fori as an act from which no civil liability arises; and (2) an act from which no civil liability arises in a foreign country may be considered in the country fori as a tortious act. Frankenstein gives the following example: A German national negligently kills an American in America; the German law provides that his liability is to be determined by the law of the place of the killing,

[34] *E.g.*, Pillet, *op. cit.*, Vol. 1, p. 113. Weiss means here *ordre public international* (*Manuel de droit international privé*, 1925, p. 392). For Niboyet the words 'ordre public' mean a different thing in internal law and a different thing in international law (*op. cit.*, Vol. 3, p. 488).

[35] 'Inconciliable avec notre sens de la morale et de l'equité', see Schnitzer, *op. cit.*, Vol. 1, p. 209 and the decisions of the Supreme Court there quoted: BG. 64.II.97; 63.II.303; 60.II.78 (9).

[36] Art. 21 of the new Law of 1938; the same rule prevailed before 1938 (see Diena, *op. cit.*, p. 385).

[37] Art. 30 of the Introductory Law to the German Civil Code of 1896; the last words in translation by M. Wolff: 'of a German legal rule', see M. Wolff (English), *op. cit.*, p. 172.

i.e., by American law; in some States of the American Union the person who commits a homicide is not liable to pay damages, and therefore a claim for damages would fail; quaere, when the administrator of the estate of the deceased brings an action for damages against the German killer in a German court; probably, he says, the German court will treat the American rule refusing damages in case of homicide as non-applicable in Germany under the quoted Article 30 of the Introductory Law and probably damages will be awarded against the German defendant.[38]

Besides the exclusion of the foreign law by the clause of ordre public and by similar clauses, there are also some other grounds of the exclusion of lex loci delicti commissi.

The Italian Penal Code admits criminal proceedings in Italy in cases of certain acts committed abroad although under the lex loci the act does not entail any liability to punishment. If an illegal act committed in a foreign country is treated by the Italian law as a civil delict and as a crime it may happen, says Diena,[39] that the victim of such an act will obtain damages in an Italian court in conformity with the Italian lex fori and not with the lex loci commissi. The victim may take part in such proceedings as ' civil plaintiff ' (Article 7 of the Code of Criminal Procedure) and may recover damages from the accused guilty of such an act which under the lex fori constitutes an offence.

Like the Italian Code, other codes of Continental European countries provide in some specific cases for punishment of offences committed abroad by nationals, and even by foreigners, although under the lex fori the acts do not constitute punishable offences. There, too, a victim can take part in criminal proceedings as a ' civil plaintiff ' and claim damages. It seems improbable that the court would inflict a punishment on the accused and at the same time dismiss the claim for damages if the punishable act resulted in damages to such a plaintiff; and in awarding damages the court will apply the lex fori.[40]

The German Supreme Court has applied the German law in a case of so-called injury to a trade mark, when a German national caused damage to another German abroad by infringing his right to a trade mark.[41] In another case of a tort committed by a German consul abroad, even though he was not a German national, in his capacity of consul damages were ascertained in conformity with

[38] Vol. 2, *op. cit.*, p. 382.
[39] *Op. cit.*, p. 384.
[40] Comp. Bartin, *op. cit.*, p. 412; H. et L. Mazeaud, *op. cit.*, No. 2238–2; comp. also German decisions RG. 16.6.1903 and 31.3.1916, quoted by Lewald, *op. cit.*, p. 267.
[41] RG. 14.11.1889, Vol. 45, p. 442, quoted by Staudinger Rappe, *op. cit.*, p. 223.

the German law and not with the law of the place where the wrong was committed.[42]

The most striking restriction of the applicability of foreign law in the matter of torts committed abroad is contained in the provision of Article 12 of the German law already quoted, stating that no broader claims are maintainable against a German for non-permitted acts committed in a foreign territory than claims which are maintainable according to German laws. The German doctrine calls this rule ' a protective clause '.[43] A German national, when tried by a German court, cannot be ordered to pay a larger amount for a wrong committed abroad than he would be ordered to pay if he had committed the wrong in Germany. The rule does not apply to foreigners with regard to whom the lex loci delicti is applicable. The provision determines the maximum of liability of a German national for a wrong committed abroad.[44] A judgment of a foreign (*i.e.*, non-German court) which directs a German national to pay more than he would be directed to pay if the quoted provision had been applied is not enforceable in Germany.[45] A German national cannot be declared liable by a German court if a wrong committed abroad is not actionable under the German law.[46] This ' protective clause ' granted to defendants of German nationality has been strongly criticised by the majority of German writers, and indeed nothing, we submit, can justify it.[47]

WHERE IS THE LOCUS ACTUS?

We have used the term ' lex loci ' many times; but what is the locus actus?

In the immense majority of everyday cases there can be no doubt in which country that locus is. Yet, it is doubtful in which country the wrong was committed if A has administered poisonous pills to B during a trip when the first pill was given in Dover, the second in Calais, and the third in Brussels. This is one of the cases where the locus actus is doubtful. The other type of case is where the wrong-

42 See Staudinger Rappe, *op. cit.*, p. 224. Comp. also decisions in RG. 16.6.1903 and 31.3.1916, quoted by Lewald, *op. cit.*, p. 224.

43 Comp. Wolff (Germ.), *op. cit.*, p. 103; Frankenstein, *op. cit.*, Vol. 2, p. 377, and *seq.*; Staudinger Rappe, *op. cit.*, p. 209.

44 So Lewald, *op. cit.*, para. 325. The German Supreme Court held that the liability of a German national exists also in such cases when the foreign law considers this liability as arising from a tort and the German law as arising from a contractual obligation, see RG. 29.9.1927, quoted by Lewald, *op. cit.*, para. 325; comp. also Staudinger Rappe, *op. cit.*, p. 212.

45 See Frankenstein, *op. cit.*, Vol. 2, p. 381.

46 See Staudinger Rappe, *op. cit.*, p. 211.

47 Under a German decree of 1942 German law is applicable in cases where a German national has committed abroad a non-permitted act if the victim of such an act is also a German national, see Schnitzer, *op. cit.*, Vol. 2, p. 543.

doer acts in one country, but the effects of his act occur in another country.

Paul de Voet, as early as the seventeenth century, discussed the case where a man standing at the border of one country shoots an arrow and kills a man in another country.[48] Goodrich in the United States discusses the same problem in a more modern way: Voet's arrow is replaced by a gun, and in his example the defendant in State A fires a gun injuring the plaintiff in State B.[49] With the present development of technical science we may expect that in our problem the gun will be replaced by a privately owned flying bomb with an atomic bomb inside. The defamation of A being in one country by B broadcasting from another country gives rise to the same problem—without bloodshed.

There is no unanimity of opinion in the doctrine and in the practice of the courts as regards this problem. The German Supreme Court has taken the view that the locus delicti is in any country where the wrongdoer acted and in any country where the effects of such wrong took place.[50] 'It is possible—says the German Supreme Court—that in one and the same case the locus actus is Mexico and Berlin, Hamburg and New York, and so the law applicable to that case may be the law of Mexico, German law and the law of the New York State.[50] Under this doctrine the injured person may select the law of any country where a part of the wrongful set of facts, including both acts and effects, has taken place.

This point of view is not accepted by the majority of German authors, who object, *inter alia*, to the possibility of the application of more than one national law to one case. They accept as the locus delicti the place where the wrongdoer was present at the time when he committed the wrong.[51] One author exceptionally also accepts the application of two laws when the wrongdoer while committing the wrong was at the border of one State and the wrong took effect in the other State, *e.g.*, when one person stands on German soil and when his dog bites another person on Austrian soil; he admits here that both laws—Austrian and German may be applied.[52] In cases of a wrongful omission some authors submit

[48] Pauli Voetii, *De Statutis eorumque concursu*, Lect. I, cap. I, 8.
[49] H. F. Goodrich, *op. cit.*, p. 219.
[50] The leading decision in this matter from 19.10.1909, 72, p. 41, quoted after Frankenstein. *op. cit.*, Vol. 2, p. 367. See also RG. 19, p. 362; RG. 22, p. 305; RG. 27, p. 418, quoted by Staudinger Rappe, *op. cit.*, p. 202; RG. 54, p. 205, quoted by M. Wolff (Germ.), *op. cit.*, p. 101; and decision quoted by E, G. Lorenzen, *Cases on the Conflict of Laws*, St. Paul, 1932, p. 215.
[51] See writers quoted by Staudinger Rappe, *op. cit.*, p. 201.
[52] So Staudinger Rappe, *op. cit.*, p. 206.

the application of the law of the place where the wrongdoer was at the time of his wrongful omission,[53] but the majority seem to be in favour of the law of the place which imposed on the wrongdoer the wrongfully neglected duty to act.[54] Frankenstein would here apply the lex patriæ of the wrongdoer and quotes for his support a decision of the Belgian Court of Cassation which applied the Belgian law where a Belgian national was killed in Germany when a house belonging to a Belgian company collapsed.[55]

Arminjon is strongly opposed to the view of the German Supreme Court; if the lex fori is silent as to the determination of the place where the wrong was committed—he says—the unlawful act must be considered as having been committed in the place where the actor was physically present at the time when he acted or when he neglected to act; the facts which preceded such an act, and the facts which resulted from such an act are immaterial; if it is not possible to determine that place, the proper law is the law of the domicile or of the usual residence of the wrongdoer; the lex domicilii is also the proper law if it is proved that the wrongdoer wanted to evade the lex loci actus and with this purpose committed the wrong in a place where the law was more favourable to him.[56]

Meili points out that it is difficult to set up a formula suitable for every case and he submits that a tort is to be regarded as having occurred in the jurisdiction in which the act either immediately or eventually producing the damage can be considered as having been completed, in so far as any further effect is merely a necessary consequence.[57]

The Swiss Federal Court follows the German decision; the locus actus—Schnitzer sums up—is surely the place where the actor was at the time when he committed the wrong; the place where the harm is done is also often considered to be the locus actus; and it is generally accepted—he says—that the locus actus is any place where any part of the non-permitted act was consecutively performed. The victim of such an act can base his claim on the law which is for him the most favourable; properly speaking—he says—we have to do more with the locus laesionis than with the locus delicti commissi.[58]

[53] So Zitelmann quoted by Staudinger Rappe, *op. cit.*, p. 208.
[54] Sic Staudinger Rappe, *op. cit.*, p. 208, and Walker quoted by Frankenstein, Vol. 2, *op. cit.*, p. 369.
[55] Decision of 26.11.1908, quoted by Frankenstein, *op. cit.*, Vol. 2, p. 370.
[56] See Arminjon, *op. cit.*, p. 412.
[57] See Meili, *op. cit.*, p. 365.
[58] See Schnitzer, *op. cit.*, Vol. 2, p. 543, and the decision of the Swiss Federal Court, BG. 43.II.309, quoted there.

The rule of the Polish law is that obligations ex delicto and quasi delicto are governed by the law of the State 'where the fact occurred which was the cause of the obligation' (see *supra*). The Polish Supreme Court held that these words do not contain a sufficient indication of the proper law when the obligation was created by a series of acts which occurred in different countries. The court held that the construction of the words 'act which was the cause of the obligation' should be a very large one; the words mean not only the acts but also the effects of the acts; and the proper law is not only the law of the place where the action began but also the law of the place where that action had its effects; in such a way the proper law is the law of the State where the action had its effects, and also the law of the State (or States) where any part of the wrongful set of acts has taken place. Thus, an obligation resulting from a delict may be governed by more than one law.

This part of the decision is analogous with the practice of the German Supreme Court, but the conclusion of the Polish Court differs substantially from that of the German Courts: the Polish Court held that when one set of acts can be submitted to different laws, the proper law to be selected is the law which is the most favourable for the defendant (if there are no special rules which prevent the application of such a law).[59]

It is interesting to compare the quoted decisions with the American doctrine which has elaborated the problem in detail.[60]

The point of view of the American Restatement of the Law of Conflict of Laws,[61] accepted, *inter alios*, by Goodrich, is that the place of the wrong is in the State where the last event necessary to make an actor liable for an alleged tort takes place. The tort—says Goodrich—is completed only when the harm takes place, for this is the last event necessary to make an actor liable for the tort; thus, if the defendant in State A fires a gun injuring the plaintiff in State B, the locus delicti is B; similarly, if the defendant makes a fraudulent representation the place of wrong is not where the fraudulent representation was made, but where the plaintiff as a result thereof suffered a loss.[62] Where harm is done to the

[59] See Decision of the Polish Supreme Court of 7.9.1936, No. C. III, 1167/35, Official Collection 1937, No. 318 in *Journal Clunet*, p. 627 and *seq.* with a note of Babinski.

[60] Comp. M. Hancock, *Torts in the Conflict of Laws*, Chicago, 1942, called 'problem of multiple contact cases', p. 171.

[61] See Restatement, para. 377, and *seq.*

[62] See Goodrich, *op. cit.*, p. 223, and some American decisions quoted there and following that doctrine.

reputation of a person the place of wrong is where the defamatory statement is communicated.[63] [64]

This American doctrine has met some opposition even in the United States where Cook wrote: 'I see no special virtue in "the last event" doctrine which seems to me to have been reached largely by confused reasoning based upon ambiguous language . . . it seems to me that it would be sensible to adopt whichever of the two (or more) domestic rules is most favourable for the plaintiff. After all, the defendant did act for his own purposes, and his act caused the damage; if the domestic rule of one of the States would impose liability if all happened there, why not allow recovery? If one rule is to be chosen, the "place of the acting" rule of some Continental systems seems to me at least as sensible as the "last event" rule and in some cases even easier to determine because of ambiguity of the word "last event"'.[65] And so this author is inclined to the method adopted, as we have seen, by the German Supreme Court.

The American doctrine may also be contrasted with the dicta expressed recently in an English case where the Court of Appeal interpreted the words 'torts committed within the jurisdiction' contained in Order XI of the Rules of the Supreme Court and where Lord du Parcq said: 'looking at the substance of that matter without regard to any technical consideration the question is: where was the wrongful act, from which the damage flows, in fact done? the question is not where was the damage suffered, even if damage may be of the gist of the action'.[66]

These dicta coincide with the doctrine already referred to and accepted by the majority of Continental writers as to the locality of torts.

THEORETICAL GROUNDS FOR THE CHOICE OF LAW

What are the theoretical grounds for the choice of law when a tort has been committed abroad?

Savigny says that the laws relating to delicts are always reckoned among coercitive statutes; 'in that therefore, we must always have

[63] See Restatement, para. 377, but the Proposed Final Draft No. 3 of the Restatement (1932) (Subject covered—wrongs) contained a different provision: 'where harm is done to the reputation of a person, the place of wrong is where the statement affects or tends to affect his reputation' (s. 411E).

[64] Comp. *inter alios*, also Stumberg: 'The prevailing American view is that the law of injurious effect of the defendant's conduct determines liability' (G. H. Stumberg, *op. cit.*, p. 163).

[65] W. W. Cook, *The logical and legal bases of the Conflict of Laws*, Cambridge, Mass., 1942, p. 344, and *seq.*

[66] *George Munro Ltd.* v. *American Cynamid and Chemical Corporation*, Law Reports, 1944, K.B.D., C.A., Feb. 16, 17, p. 441.

regard to the law of the place of the action, not to that under which the delict was committed. This whole question is merely akin to that of penal law, whether a crime committed abroad is punishable by our courts and with what penalty. Yet the two questions must not be identified, because in penal law, as a part of the public law, considerations must be kept in view of which no account is taken in obligations arising from delicts '.[67]

'This theory' writes Arminjon, 'confounds the rules as to jurisdiction with the rules as to the points of contact, and also exaggerates the territoriality of penal laws; would it be just to submit persons who exercise their activities under one legal system to the laws of other systems where a claim may be introduced against them?'[68]

And Cheshire says even more firmly: 'to measure the defendant's liability by reference to the lex fori alone is illogical, if not indeed fantastic, for the result will almost certainly be to give to the plaintiff either more or less than he would have been entitled to—had the cause of action been submitted to the legal system with which alone it has any real connection '.[69]

I submit that the accidental test of the lex fori is not the proper test for the choice of law.

Recently Frankenstein advocated the application of the national law of the wrongdoer to his wrongful acts committed abroad: 'every person is submitted to the rule of one legal order . . . when a person commits a wrong in a foreign country the legal consequences of such a wrong as regards his civil liability are governed by the same legal order by which all liabilities of such a person are governed, *i.e.*, by his national law '.[70]

Some authors do not go so far as Frankenstein and restrict the application of the personal law of the wrongdoer to cases where both the wrongdoer and the person who has suffered damage belong to the same country.[71]

I am unable to agree with the idea that a foreigner remains in every respect subject to his personal law and that the proper law for the choice of law should be the test of nationality or of domicile of the wrongdoer.

[67] F. C. *v.* Savigny. *A treatise on the Conflict of Laws*, transl. by W. Guthrie, Edinburgh, 1880, 2nd ed., p. 253.

[68] Arminjon, *op. cit.*, p. 340. Comp. H. et L. Mazeaud who, while admitting that the almost universal opinion of the French jurists accepts the lex loci delicti, recommend the adoption of the lex fori, and base their opinion on the provision of art. 3 of the Code Civil (*op. cit.*, No. 2239–3, and *seq*).

[69] Cheshire, *op. cit.*, p. 296.

[70] Frankenstein, *op. cit.*, Vol. 2, p. 296.

[71] *E.g.*, Weiss, *op. cit.*, p. 582.

As we have seen in the majority of countries, the settled principle is that the lex loci actus should be applied to wrongs. Some writers who support this principle consider that a delict or a quasi-delict constitute a violation of the local sovereignty and that the local law should be applied to the effects of such violation.[72]

'Obligations arising out of civil tort rest upon a violation of these rules of law which govern the conduct of each individual toward every other person in his general intercourse with the world—states Meili; it is obvious that the will of the parties cannot form a standard; neither can the lex patriae or lex domicilii; it is solely the law of the momentary sojourn which controls'.[73]

For Pillet the proper sanction for the delict or quasi-delict committed in a territory is the sanction organised by the local law because only the local sovereign is interested in the maintenance of legal order.[73]

Weiss finds an argument for the application of the lex loci in article 1382 of the French Code Civil providing for liability for damages caused through a fault of a person and states that such provision binds everybody who is on French soil independently of the nationality of the wrongdoer and without regard to the provisions of other laws; French international public order is interested in the application of French law, and this order ceases to be interested when the delict or quasi-delict is committed out of France.[74]

I submit that many English and American dicta are perfectly applicable to the continental systems of private international law of torts. 'It is that law under which he (a person) is living at the time of his conduct complained of, and it is that law alone which can claim to determine the legality or illegality of his actions'.[75] 'The obligation (arising from the commission of a tort abroad) is the principal to which a right of action in whatever court is only an accessory, and such accessory according to the maxim of law follows the principal, and must stand or fall therewith'.[76] 'The theory . . . is that, although the act complained of was subject to the law having force in the forum, it gave rise to an obligation, an obligatio, which like other obligations, follows the person, and may be enforced wherever the person may be found. . . .'[77]

[72] Comp. Zittelmann, quoted by Meili, *op. cit.*, p. 358.
[73] Pillet, *op. cit*, Vol. 2, p. 313.
[74] Weiss, *op. cit.*, p. 582.
[75] See Cheshire, *op. cit.*, p. 294.
[76] Per Willes, J., in *Phillips* v. *Eyre* (1870), Law Rep. 6 Q.B. 1.
[77] Per Holmes, J. in *Western Union* v. *Brown* (1914), 234 U.S. 542—comp. Goodrich, *op. cit.*, p. 230. But another American, Judge Hand, said: 'In the very nature of things, courts can enforce no obligations which are created elsewhere; where dealing with such obligations, they merely recognise them

Hancock adds another ground for the applicability of the lex loci delicti: 'The reasonable expectations of the parties are not the least of the various factors considered in choosing the proper law. It would be inequitable to determine their rights and duties upon a principle whose application to their affairs they had no reason to anticipate; from this point of view the law of the place of wrong would seem to be a satisfactory choice'.[78]

It does not seem doubtful that each State has legislative jurisdiction to determine legal effects of acts done or effects caused within its territory. A person acting within a territory of a State is bound by the laws of that State and owes obedience to such laws. If such a person breaks the laws of that State by committing an unlawful act and becomes liable to another person there are no grounds why such a liability should not be recognised—as a general rule—in any other civilised country. When a person breaks the rules which bind him he must bear the legal consequences of the breach; if some legal obligations arise from the breach, such obligations create rights, and such rights duly acquired in one country should be respected everywhere.

Each State—as we have submitted—has jurisdiction to determine legal consequences not only of acts done within its territory but also of *effects* caused within its territory. The law of torts consists of a body of rules of conduct of persons and of protection of victims of unlawful acts of such persons. A person within a State owes obedience to the laws of that State and at the same time has the right to be protected by the laws of that State.[79] When a wrongdoer acting in one country causes unlawful damage to a person in another country, the laws of that second country which protect the victim are infringed. When A acts in country Y and B suffers damage in country X—A also breaks the law of the State which protects B. I submit that in such a case where the wrongdoer acts in one country and the damage is suffered in another country and when the laws of two countries are infringed, the point of view of the German Supreme Court should be followed: the law of the place where the wrongdoer acted and the law of the place where the

as the copies, which they themselves enforce', as quoted by Lorenzen, who is inclined to adopt this last theory (see E. G. Lorenzen, 'Tort Liability and the Conflict of Laws', *Law Quarterly Review*, Vol. 47, 1931, pp. 483–501). As to this last point of view I respectfully submit that the courts can enforce obligations created elsewhere and arising under foreign law, and that, when doing so, they enforce the law of their own sovereign.

[78] Hancock, *op. cit.*, p. 31.

[79] Comp. J. H. Beale: 'The place where any tort is committed depends upon the place where incidental *right of protection* is injured' (the italics are those of the present author). (*A Treatise on the Conflict of Laws*, 1935, Vol. 2, p. 1287).

events happened caused by the wrong may be applicable—and the choice of law should be left to the victim. I agree with Cook that it would be sensible to adopt whichever of the domestic rules is most favourable for the plaintiff.[80] I submit that the law which protects the victim should have the same weight in determining the place of the wrong as the law of the locus actus; and there is nothing shocking in this right of choice conferred on a person who after all is a victim of another's wrongful activity; such right to choose conferred on the plaintiff is not unknown to the law of contracts.

We have submitted that the lex loci delicti commissi follows from the axiom that a person owes obedience to the law of the country in which he is actually present and from the axiom that a person has the right of protection by the law of the country in which he is actually present. But it should be pointed out that in some respects a person, even when abroad, owes obedience to his personal law; I submit that when such a person commits a breach of his personal law (lex patriae or lex domicilii), that law should be applied instead of the lex loci delicti commissi. The laws affecting family relationship constitute an example of laws binding a person even when that person goes abroad or leaves the country of his domicile. Nobody can escape liability for torts affecting family relationship by going to another country and there committing an act which under his personal law is an injury affecting his family relationship, but which is justifiable under the lex loci. The conjugal relations of spouses domiciled in England are protected by English law irrespectively of the place where such spouses sojourn, and similarly the conjugal relations of Polish spouses are protected by Polish law irrespectively of the place of their sojourn. They owe obedience to their personal family laws, and a breach committed in any place gives rise to such an obligation as the proper law provides. 'In the case in which the English court would entertain action for divorce by the husband, it can scarcely be supposed—says Westlake—that the co-respondent could escape paying damages on the ground that the adultery was committed in a country where they are not recoverable for it, if at least it was committed at a time when the English domicile on which the jurisdiction for divorce is founded already existed; such adultery would

[80] See Cook, *op. cit.*, p. 344. J. H. C. Morris reviewing M. Wolff's Private International Law, writes: 'To an English reviewer it is a source of mild amusement that an American writer (*i.e.*, Cook) should approve the German rule that the plaintiff can select the law most favourable to himself, while a German writer (*i.e.*, Wolff) considers the Restatement's last doctrine to be 'admirably formulated' (*Law Quarterly Review*, 1946, p. 91), yet the author of the present notes follows Cook.

be an injury to a conjugal relation deemed to be protected in the English Court '.[81]

There is another class of cases where—it is submitted—the personal law of the tortfeasor should be applicable, and not the lex loci delicti commissi. Here belong the torts committed by officials abroad in their official capacity when they are sued in the courts of the country whose servants they are; the law which determines the effects of such a breach is then the lex fori, and not the law of country where the breach was committed. We agree with the practice of the German Supreme Court which applied the German law when damages were caused by a German consul abroad in his capacity of consul (see *supra*, p. 180).

But when an official is sued in a foreign country where he committed a tort in his official capacity, and assuming that the immunity from local jurisdiction is not granted to him, his tortious liability ought to be primarily ascertained by the lex loci delicti commissi. This solution was recently accepted by the English Court of Appeal.[82]

[81] J. Westlake. *A Treatise on Private International Law*, edited by N. Bentwich, 1922, p. 271.

[82] *Szalatnay-Stacho* v. *Fink*, Times Law Reports, Vol. 62, pp. 146–147 and 573–576. The plaintiff was the Czechoslovak diplomatic representative in Egypt and a Czechoslovak national; he complained of the publication in England by the defendant of defamatory matter charging him, *inter alia*, with serious criminal offences; the alleged libel was contained in a document sent by the defendant to the Military Office or Chancellery of the President of the Czechoslovak Republic in England; the defendant, also a Czechoslovak national, was at the material time, Public or General Prosecutor of the Czechoslovak Military Court of Appeal, established in the United Kingdom under the Allied Forces Act, 1940. The defendant pleaded absolute privilege for the statements made by him; alternatively, that the statements were made without malice on an occasion of qualified privilege. Mr. Justice Henn Collins (King's Bench Division) gave effect to the first plea: 'I find', he said, 'that in Czech law, which for me is a question of fact, this communication could not have founded any action, civil or criminal'; he decided that by the comity of nations, His Majesty's Courts should extend to communications such as this, passing between Czech nationals on Czech affairs, the same protection as their domestic Courts would afford. Thus, to a tort committed in England he applied Czechoslovak law.

The plaintiff appealed and the Court of Appeal affirmed the decision on different grounds. The Court rejected the test of the lex patriae of the parties and gave effect to the lex loci actus. 'Having due regard to the exceptional position of the Czechoslovak government we do not think that the principle of the comity of nations compels or entitles the courts of this country to apply Czechoslovak law to acts done here in proceedings *in tort* between Czechoslovak citizens, that law giving a general protection in civil suits to acts done by officials which is not afforded under our law. This would be to make an inroad on a very fundamental principle. If there is to be such an application of foreign law in the circumstances set out, it would, in our opinion, have to be expressly provided for by the legislation. We therefore decide that this document was not absolutely privileged. There remains the question of qualified privilege, and, if that is established, of malice. In the first place it is necessary to be clear as to the relevance of Czechoslovak law. In our opinion the principles of English law are applicable to a document produced and published in England. In considering

whether there was a duty on which a plea of qualified privilege can be based, it is, of course, necessary to consider the position and duties of the defendant as an official of the Czechoslovak government and the position of those to whom the document was published' (p. 575). In considering the question of malice the court applied English law 'having due regard to the defendant's position and obligations as an official of the Czechoslovak government' (p. 576). The defendant's position was governed by the Czechoslovak law and the court examined different Czechoslovak statutes, such as the Code of Military Procedure, etc. And the court held that qualified privilege did attach to the documents and that there was no evidence of malice. The lex loci delicti commissi was applied by the court, but the court has not completely disregarded the lex patriae of the parties.

Quaere how the case would have been decided if the plaintiff had sued in Czechoslovakia? we submit that Czechoslovak courts would have selected the Czechoslovak law—the lex patriae as the proper law to determine the defendant's liability.

The question of liability of officials for torts committed abroad came before the Privy Council in *Hart* v. *Gumpach* (1872), L.R. 4 P.C., pp. 439–467. An action was brought in His Majesty's Supreme Court for China and Japan, for false representation made by the defendant occupying an official post in the service of the Emperor of China to the head of the Foreign Board of Peking respecting the conduct of the plaintiff as a professor in the college established there. Art. XV of the Treaty of Tientsin provided that 'all questions in regard to rights, whether of property or persons, arising between British subjects, shall be subject to the jurisdiction of the British authorities'. In delivering the judgment, Sir Montagu Smith, said that the effect of the Order of the Queen in Council establishing the Supreme Court, and delivering its power and jurisdiction is, that the law of England, as between British subjects shall be administered in it (p. 466). Although the alleged tort was committed by an official of a foreign country in his official capacity, the effect of the Treaty was that the Privy Council did not need to consider whether the act of the defendant was not justifiable under the lex loci actus, and that the case was tested by the English law alone.

SOME LEGAL PROBLEMS ARISING OUT OF THE ESTABLISHMENT OF THE ALLIED MILITARY COURTS IN ITALY

By Ian Campbell, of the Inner Temple and Lincoln's Inn, Barrister-at-law; lately Chief Judicial Officer, H.Q. Allied Commission for Italy

This article is intended as a short review of the Allied Military Courts in Italy, from their inception on the first invasion of Sicily in July, 1943, until the cessation of hostilities in 1945.

Inevitably, much of the ground covered is factual and many of the observations made would apply equally to military courts elsewhere: but certain points of peculiar application to Italy in the period 1943 to 1945 emerge and these, it is hoped, may be of more particular interest. The reader is asked to avoid the danger of facile comparison between the Allied Military Government and Courts in Italy during the period covered by this article, with the Military Government and Courts in Germany and Austria since the termination of hostilities: their organisations and their roles differ; and, of course, with the end of hostilities there is a sharp change in the relative importance of field force units and the Military Government.

Before the Allied invasion of Sicily and Italy, Military Government, including Military Courts, had long been established in the former Italian colonial territories in Africa; but the task in such territories, in which a large part of the population consisted of natives, was of a very different complexion to that facing the Allied Military Government and Courts in Metropolitan Italy—a country in parts highly industrialised, of the oldest civilisation and culture, very heavily populated, and having a criminal class of notorious skill and daring. Moreover, there were two further factors which made the task more complex: the administration, which in its early days was under the command of the organisation known as the Allied Military Government of Occupied Territory (AMGOT) and later under the Allied Control Commission (which in turn became the Allied Commission), had so to be organised as to carry out its duties behind advancing armies and therefore over a constantly changing area: and the administration was Allied throughout in the sense that the American and British elements of the staff (both

officers and other ranks or enlisted men) throughout the organisation were 'integrated' so that a member of either army might find his immediate superior and his immediate junior, members of the other army.

OF THE NATURE OF MILITARY GOVERNMENT AND COURTS

In order properly to appreciate the powers, duties and problems which confront Military Courts in occupied territory, it is necessary to have in mind the nature of the rights and duties of the occupant of such territory.

It would be outside the scope of this article to attempt any definition or exhaustive analysis of those rights and duties: but the position may, perhaps, be summed up by saying that the occupant, while having no sovereignty over the territory, exercises military authority over it: that in exercising that military authority the paramount consideration is the safeguarding of the maintenance and safety of the occupying forces: but, subject to that paramount consideration, the occupant must administer the territory for the public benefit of the inhabitants and with due regard for the established law of the country. The exercise of that military authority connotes the right to promulgate such legislation and give such orders (not being inconsistent with the Hague Regulations or otherwise forbidden by International Law) as the occupant deems necessary, and to establish Military Courts for the purpose of securing obedience to such legislation and orders and also to the indigenous law of the country, so far as it is permitted to remain in force. This article is, therefore, a brief review of the activities of the courts established for that purpose in Sicily and Italy.

OF THE LAW ENFORCED

The legislation establishing the Allied Military Government was consolidated in one Proclamation known as Proclamation No. 1. In addition to this Proclamation, the Military Government legislation consisted of certain other Proclamations and General Orders, each dealing with a special subject, and Regional and Provincial Orders. The Proclamations and General Orders were posted, and had effect, throughout the occupied territory; Regional and Provincial Orders, as their names imply, were of limited application, having effect only in the Region or Province in which they were promulgated. Most of the prosecutions before the Allied Military Courts were brought under Proclamation No. 1, which consisted of an introductory exhortation to the people of Italy, and of three

main parts: Part I, establishing the Allied Military Government; Part II, declaring offences; and Part III, creating Allied Military Courts.

Part II, Article IV, declared certain offences punishable by death, imprisonment or fine: for example, serving the enemy as a spy; communicating with the enemy; bearing arms against the Allied Forces; possession without a permit of firearms, ammunition or explosives; possession of wireless transmitting apparatus; destroying, damaging, interfering with, stealing or wrongfully receiving or having in possession any property of the Allied Forces over a stated value; interference with communications; killing any member of the Allied Forces or assaulting such a member with intent to kill or inflict serious bodily harm; robbing the dead or wounded; counterfeiting; and violating any of the laws of war or doing any act in aid of the enemy or hostile to or endangering the safety or security of the Allied Forces.

By Article V certain other offences were declared to be punishable by fine or imprisonment: for example, giving false evidence; destroying, damaging, interfering with, stealing or wrongfully receiving or having in possession any property of the Allied Forces below a stated value; assaulting a member of the Allied Forces; offering or accepting bribes; or doing any act to the prejudice of good order of the occupied territory or the safety or security of the Allied Forces.

Article VII also made a violation of any provision of Italian law an offence under the Proclamation, and provided that any person accused of such an offence might be brought to trial before an Allied Military Court and, on conviction, might be punished as provided by Italian law. This was a very necessary provision, but such trials were discouraged, for trials under a code and system of law of which the Court is ignorant are not calculated to be satisfactory.

OF THE COURTS ENFORCING THE LAW

The Proclamation established Allied Military Courts of three grades known as Summary, Superior, and General Military Courts.

Summary Military Courts were composed of one officer. So far as the limited supply of legal officers permitted, these Courts were held by legal officers: in practice, very many Summary Court cases were tried by lay officers. The power of sentence of a Summary Military Court was limited to imprisonment for a period not exceeding one year or to a fine not exceeding 50,000 lire, or both such imprisonment and fine.

Superior Military Courts were composed of one qualified legal officer with or without other officers and had jurisdiction to impose any lawful sentence other than death or imprisonment for a period of more than ten years.

General Military Courts consisted of not less than three officers. The President was always a selected senior legal officer and every effort was made to ensure that one other member of the Court was also a legal officer. These Courts had power to inflict the penalty of death or any less penalty. In practice, although the list of offences punishable by death was lengthy, comparatively few cases were sent for trial before General Military Courts, such Courts only being convened if there were grounds for thinking that the proper sentence, if the accused were convicted, might be above the jurisdiction of a lower Court.

OF THE JURISDICTION OF THE ALLIED MILITARY COURTS

The jurisdiction of the Allied Military Courts was limited in two ways: by the persons over whom they had jurisdiction and by the territory within which they had jurisdiction.

The Allied Military Courts had no jurisdiction over 'members of the Allied Forces'. The proper interpretation of that phrase gave rise to considerable difficulty. There were, in Italy, certain somewhat amorphous bodies of troops which formed part of the armed forces of one of the 'United Nations' but which took no easily discernible part in the prosecution of the war. Some members of these bodies conceived the plan of carrying on certain trading transactions of a nature forbidden by Allied Military Government legislation, between one part of Italy and another. Eventually, some of those engaged in these activities were arrested and charged before the Allied Military Courts for contravention of Allied Military Government legislation. They, of course, pleaded that they were members of the Allied Forces and therefore not subject to the jurisdiction of the Allied Military Courts. This, as will be appreciated, gave rise to a question of some nicety. The expression 'members of the Allied Forces' had been defined as including members of organised contingents of the Armed Forces of the United Nations who were under the command of the Commander-in-Chief, Italy, but as excluding any member of such nations who was not a member of an organised contingent: and ultimately the view prevailed that, in the circumstances of the case, the body to which the accused belonged did not fall within that definition.

A question of novelty and interest arose in regard to Italian troops participating in the war on the Allied side. Were they to be

considered as members of the Allied Forces and therefore outside the jurisdiction of the Allied Military Courts? It will be remembered that Italy, after the Armistice concluded with the Allies in 1943, did not become an ally, but merely a ' co-belligerent '. The view was taken, therefore, that Italian troops were not ' members of the Allied Forces ' and were accordingly subject to the jurisdiction of the Allied Military Courts. However, as it was not desired to do anything which might be harmful to the discipline or morale of our co-belligerents, this jurisdiction was exercised sparingly and, except in serious cases directly affecting the Allied interests, Italian soldiers accused of offences were handed over to their own military courts for trial.

Under the ordinary principles of international law, the Allied Military Courts had jurisdiction only within such territory as was, for the time being, under military occupation.

Upon the capitulation of Italy in September, 1943, the King of Italy, with certain of his advisers, betook themselves from Rome to the southern parts of Apulia. For reasons of policy, it was considered undesirable that the King of Italy should reside in territory subject to foreign occupation and control, and therefore the four southernmost provinces of Apulia were never subjected to Allied Military Government.

Further, the area of the territory under Allied occupation did not remain constant: it commenced on the beach-heads of Sicily and Italy and spread northwards as the Allied armies advanced. However, concurrently with this spread northwards, another process was at work. From time to time, starting in the Spring of 1944 with Sicily and certain of the southernmost parts of Italy, large areas were restored by the Allies to the administration of the Italian Government and thereupon ceased to be subject to the Allied Military Government. On each such restoration, the area under Military Government was substantially reduced, only to be enlarged again upon the next advance by the Allied armies.

Under international law there would have been no right to establish Allied Military Courts in the four provinces of Apulia above mentioned, or to continue to establish such Courts in the territory so restored. However, it was thought most necessary that the Allies should have this right and an agreement in this respect was come to with the Italian Government.

To give effect to such agreement it was necessary for the Italian Government to promulgate legislation. This took the form of a Decree (R.D.L. of February 11, 1944, No. 31, as amended by R.D.L. of April 13, 1944). The following is a translation of the relevant parts thereof:—

'Whoever within the territory restored to the Italian Administration commits a hostile act or commits an offence against property to the prejudice of the Allied Military Forces or any member thereof or of any functionary representative or agent of the United Nations or causes seditious manifestations against the Allied Forces or commits acts which in any way hamper the war effort or help the enemy shall be tried by the Italian Courts according to Italian Penal Law. However, the jurisdiction of Allied Military Tribunals shall be recognised in cases in which they think fit to take jurisdiction. In such cases the Allied Military Tribunals shall follow their own procedure but shall apply the Italian Penal Law'.

The wisdom of taking this extraordinary jurisdiction was more than justified in the event. Comparatively few, but serious, cases were tried in the territory restored to the administration of the Italian Government; but in the provinces of Apulia already mentioned the need for Allied Military Courts was substantial. Certain dissident activities came to light and those responsible were brought to trial before Allied Military Courts specially convened for the purpose; and at one time theft and looting from Allied military depots in and around Bari reached such proportions that it became necessary temporarily to establish Allied Military Courts in regular session to ensure the prompt trial and effective punishment of such offenders.

OF CERTAIN DIFFICULTIES ENCOUNTERED BY ALLIED MILITARY COURTS

The difficulties with which the Courts had to contend were numerous. The first serious difficulty was to procure reliable interpreters, whose English was intelligible, capable of interpreting for ordinary conversational purposes. But it was far more difficult to find an interpreter who was capable of acting as a Court interpreter. Further, an interpreter tended to become the 'alter ego' and personal assistant of the officer for whom he worked. Many an interpreter thus found himself in a position of considerable influence and one in which he was only too often subjected to a great (and often irresistible) temptation to accept bribes. As a Sicilian advocate put it to the writer: 'The Allies have liberated us from the rule of the Fascists; instead, they have delivered us to the rule of the Interpreters'.

In normal circumstances, a Court of Law has the assistance afforded by the employment of qualified and experienced lawyers. This aid was very largely lacking in Allied Military Courts. Whether by oversight or whether by reason of shortage of available

qualified personnel, no adequate provision was made for a prosecuting staff. This was of little consequence in the ordinary small Summary Court case; but in some of the more serious cases it gave rise to difficulties; in many cases there was no qualified person whom the investigating authorities could consult before trial; the presentation in Court of the prosecution's case suffered; and the Court was driven to carry out many of the duties which should normally be discharged by the prosecution. If the Courts received inadequate help from the side of the prosecution, they also received (with certain notable exceptions) little help from the local 'avvocati' who were, normally, instructed on behalf of the accused. Although many of these advocates were men of great intelligence and were practising regularly before the Allied Military Courts, they appeared to find it bordering on the impossible to understand either the outline of a criminal trial according to Anglo-American principles or the system of taking evidence by examination and cross-examination in open Court. Only too often the defending advocate's chief contribution to the proceedings was a speech of great length, delivered with great fluency and wealth of gesture, but irrelevant to the points in issue and largely devoted to emphasising the immense number of the accused's children and other dependants.

OF THE PREVALENT OFFENCES

It may be of some interest to consider the types of case which were commonly before the Allied Military Courts.

A number of cases came before the Courts in which the accused was charged with serving the enemy as a spy; various questions in connection with these cases are considered in a later paragraph. Prosecutions for the possession of firearms, ammunition or explosives were very common and of very varying degrees of gravity. They ranged from the case of some elderly respectable citizen who inadvertently retained an old sporting gun to the case of some gangster black-marketeer found moving contraband in the early hours of the morning with a loaded automatic in his pocket. There were several interesting prosecutions for possession of explosives in the months immediately following the Allied entry into Rome. Before their withdrawal, the Germans hid in and around Rome large quantities of explosives, and they left behind them a number of individuals who either knew, or had the means of ascertaining, the whereabouts of these deposits, and who were under orders to recover the explosives and to use them for sabotage against the Allied Forces. Many, if not all, of these men were arrested and they were prosecuted, tried and convicted for having

'possession' of the explosives in question. This gave rise to the question whether they could, in the circumstances, be said to be in possession of the explosives: for, although they knew or could ascertain the whereabouts of the explosives, they had taken no part in concealing them. It was finally held that they were properly convicted.

Perhaps the most used and controversial sections of the Proclamation were sections 11 and 27 which make punishable any person who: 'Destroys, damages, endangers, interferes with, steals or wrongfully either receives or has in his possession any property of the Allied Forces or of any member thereof. . . .' The number of cases of stealing which was tried by the Allied Military Courts was vast: the cases varied from the pettiest pilferage to theft of food and clothing by the lorry load. Most of the large thefts took place in the big ports such as Naples and were largely rendered possible by the constant acute shortage of Allied soldiers for guard and similar duties. Although the trial of these cases formed a large proportion of the work of the Allied Military Courts, they raised no particular difficulty and do not call for further consideration.

Considerable difficulty, however, was caused by the words 'wrongfully either receives or has in his possession'. In this context, what does 'wrongful' mean? does it mean that there must be an element of 'mens rea' in the receiving or possession? or does it make it an offence to receive or take possession from some person who has no right to give such possession?

Prima facie, a person who buys an article has a perfect right to give it away or sell it; but does this principle apply to an article which an officer buys from an officers' shop at a special reduced price? or was it necessary to draw a distinction between articles of officers' clothing bought at home at full price and those bought at an officers' shop at a reduced price? And what of rations? It may be that a soldier has the legal right (even if forbidden to do so) to dispose of the cigarettes issued to him; but, in general, a soldier is not entitled to any specific rations; he is entitled only to the meals provided for him; has he the right, therefore, to give away food in exchange for wine or laundry services? Further, as military rations are issued according to a scale designed to provide a balanced and health-giving diet, has any officer the right to exchange mess rations for other commodities or vegetables? These questions are not easy to answer: suffice it to say that although orders were frequently issued to the troops on the subject, those orders were largely—indeed, very largely—disregarded by all ranks: and it was a common practice amongst

officers and men to give away or barter cigarettes, clothing and rations; and it was one of the most unenviable of the tasks of the Allied Military Courts to try Italians charged with wrongfully having in possession such articles. It must be admitted that the proper construction and application of these sections was not free from doubt and while in most cases the common sense of the matter provided the answer, cases of very great difficulty arose from time to time.

A few prosecutions took place for interfering with communications by cutting and stealing military telephone lines. For good reason, the military authorities took a grave view of these cases. In the experience of the writer there was no case in which damage to telephone wire was committed with intent to interfere with the Allied military communications: in most such cases the wire was cut and stolen merely because the local peasants thought it would be of use on their farms; but in some instances the removal of the wire had serious consequences; and in some cases of this type very heavy sentences were imposed.

There were many prosecutions for killing a member of the Allied Forces. These cases, though by their very nature serious, presented no particular difficulty except as to sentence, a subject discussed below. It may be said that in the majority of such cases the accused acted under considerable provocation.

Forgery of permits and similar documents was common; there were also several cases of forgery of the currency notes issued by the Allied Military Government. Catania, it is said, has the reputation of having the best school of forgers in Italy; but during the period now under consideration most of the large scale forgeries which came before the Courts were done in Naples. Perhaps the reason is that the 'Catanesi' have reformed; or perhaps it is that their forgeries were so good that they escaped detection.

Of the offences punishable by fine or imprisonment the most common were curfew infringements, less serious cases of theft or 'wrongful possession' of property of the Allied Forces, infringement of rationing and kindred laws, travelling more than ten kilometres without a permit, and lastly, but by no means least, 'doing an act to the prejudice of good order of the occupied territory', a provision which, one must admit, was most freely used to cover a multitude of sins. However, none of these offences calls for any comment.

OF EVIDENCE: FINDING: AND SENTENCE

The Allied Military Courts, in general, followed the established rules of evidence as adopted in the Courts of England and the United

States of America; but they were permitted to admit such evidence, including hearsay, as in the opinion of the Court was relevant and material to the charge before it. This elasticity, in the circumstances, was essential; but, of course, the difficulty of evaluating such 'evidence' was considerable.

The Italian police forces, it appeared, had no scruples as to the means they used to obtain confessions and the Allied Military Courts had to be constantly on their guard against receiving in evidence 'confessions' obtained by force or threats. In one case of alleged forgery of currency notes, which was tried in Naples, the investigating authorities were anxious to obtain a confession from one of the accused; having failed to obtain one by interrogation and certain minor forms of violence, they resorted to actual bodily torture, and the confession thus obtained was offered in evidence. The Court, of course, refused to admit the confession and, in the absence of any other evidence against the accused, acquitted him. The accused was so surprised that he fainted in Court, and was heard to remark, as he came to, that he was confidently expecting to go to prison for many years.

The Allied Military Courts did not hesitate to acquit in cases where there was a reasonable doubt as to the guilt of the accused: indeed an analysis once made by the writer showed that, at that period, the proportion of acquittals was as high as one in twelve: and there are grounds for believing that this willingness to acquit in cases in which the evidence was not conclusive earned for the Allied Military Courts a considerable reputation for fairness.

The real difficulty felt by all who sat on Allied Military Courts was in determining the proper sentence to be imposed. The primary purpose of a sentence by a Military Court is to serve as a deterrent. In Italy, and particularly in Sicily and Naples, there is at all times a high incidence of crime; and the already low standard of morality was still further lowered by the sudden relaxation of the harsh discipline of Fascism, the confusion and destruction caused by war, and the consequent shortage of food and other commodities, and it was, therefore, ever necessary for the Courts to bear in mind their duty to impose effective deterrent sentences. Many of the officers sitting on the Courts were reluctant to impose adequate sentences; but there was always the danger that, by over-emphasising the need for deterrent sentences, the Courts would be induced, for fear of being too lenient, to go to the other extreme: and it was not to be desired that the Allies should obtain a reputation for brutality and excessive harshness. Indeed, there were occasions when there was more to

be achieved by moderation than by great severity, as one example will show. On one occasion, the writer was sitting in Perugia as President of a General Military Court. The accused, who was an elderly and very respectable Italian, was accused of killing an Allied soldier. The killing was not really denied; the defence was devoted to establishing (as it did establish to the complete satisfaction of the Court) that the killing was done without any premeditation and under grave provocation. The case, not unnaturally, attracted considerable attention and throughout the trial the court-room was full to capacity. Only too frequently in such cases, and in spite of all efforts by the Court to preserve proper decorum, the announcements by the Court of its finding and sentence were occasions for cheers or lamentations; and it was only to be expected that some such demonstration would take place in this case. However, to the surprise of the Court, neither the announcement of the finding of 'Guilty' nor the later announcement of the sentence (two years' imprisonment) drew a sound from the body of the Court; but when the Court adjourned and the members rose to leave the court-room the crowd burst into a spontaneous clapping; and in the next issue of the *Corriere di Umbria* there was a long article contrasting on the one hand the justice and reasonableness of the Allied Military Courts and on the other hand the brutality of the German regime under which the killing of one German soldier normally involved not only the death of the killer (if caught) but also of ten innocents by way of reprisal.

Officers sitting on Allied Military Courts frequently sought advice as to the basis upon which to assess the proper sentence: and in such cases the advice given was that they should not hesitate, in a proper case, to impose a substantial deterrent sentence; that they should never impose an unreasonably heavy sentence unjustified by the facts of the case merely 'for effect'; that they should never allow themselves to be induced, by pressure from any quarter, to impose sentences which they could not reconcile with their consciences; and that they should never impose unreasonably heavy sentences in petty cases.

OF THE REVIEW OF CASES

Every case tried by an Allied Military Court in which an accused was convicted was reviewed, and this applied whether or not the convicted person exercised his right to present a petition against the finding or sentence of the Court. Where a sentence in one or

more charges was framed under Italian law, or where it exceeded two years' imprisonment or 50,000 lire fine, the case was reviewed at H.Q.; other cases were reviewed at a lower H.Q.

In practice, the chief duty of the reviewing authorities was to avoid, so far as might be, undue discrepancies in sentence between the various courts; the number of cases in which the reviewing authorities found it necessary to vary the findings of the Court was comparatively small.

OF THE TRIAL OF PERSONS ACCUSED OF SPYING

The duty of trying persons accused of espionage was entrusted to the Allied Military Courts. Although the number of such cases tried was not very great, these trials imposed a heavy burden on the legal staff. In all such cases it was necessary not only to constitute a strong Court but also to detail one legal officer as Prosecuting Officer and another, as such trials for security reasons were held in camera and the accused could not therefore avail himself of the services of an advocate, as Defending Officer.

It will be remembered that throughout the Italian campaign there was at all times a proportion of the Italian people and army supporting the German cause. It was therefore an easy matter for the Germans to obtain Italians to operate on their behalf as spies in the parts of Italy under Allied Occupation.

From the comparatively early days of the campaign the Allies had air superiority; and it was consequently a matter of some difficulty for the Germans to carry out aerial reconnaissance as to the movement or concentration of troops, the extent to which any particular port was being used, and other valuable items of intelligence. Largely, it is thought, to counter this lack of aerial reconnaissance, the Germans appear to have used a large number of Italian agents who were either 'passed through the line' or, alternatively, 'left behind' when the Germans carried out a withdrawal. It is not within the scope of this article to discuss to what extent this practice was carried on or what degree of success was achieved; suffice it to say that of the many of these agents who were caught some were brought to trial before the Allied Military Courts. Normally such agents were entrusted with some minor mission, such as to go to some specified place or area and to report back within a stated period with items of intelligence gleaned en route. In some cases their allotted roles were more ambitious: for instance, at one phase certain agents, equipped with wireless receiving and transmitting sets, were dropped by parachute in Southern Italy

and Sicily with instructions to watch for and report any signs of preparations for an Allied expedition towards the Balkans.

Often, when a suspected agent was caught, he or she—and the Germans did not hesitate to use women and young girls—was interrogated by more than one representative of the Security Services; and usually the chief evidence adduced by the prosecution at the trial was a statement, or perhaps two or three statements, by the accused. In many cases such statements were properly obtained after due caution; but in some cases they were obtained in circumstances which, according to the Anglo-American concepts, rendered them inadmissible as evidence in a court of law. Frequently, it was a question of great difficulty to decide whether or not a statement was admissible; and persons charged with this offence were not slow to allege that any statements they might have made, if the contents were at all damaging, were obtained by promises, threats or, even, torture. The defence in these cases nearly always followed the same lines : an admission by the accused that he or she had been entrusted with an espionage mission, coupled with a denial of any intention to carry it out. In proper cases, and where the evidence so justified, the Courts did not hesitate to convict and to impose the supreme penalty; but, on the other hand, the Courts consistently refused to receive in evidence statements which they had reason to believe were not entirely free and voluntary or to convict unless satisfied, beyond reasonable doubt, as to the guilt of the accused.

OF THE NUMBER OF CASES TRIED BY ALLIED MILITARY COURTS

It has not been possible to ascertain, at this juncture, the precise number of cases tried by the Allied Military Courts during the period covered by this article. However, the following figures, which are not complete and which cover a somewhat longer period, will convey some impression of the volume of cases tried.

Type of Court	*Total number of cases tried*
General Military Courts	807
Superior Military Courts	6,672
Summary Military Courts	136,163
Total . .	143,642

As stated above, these figures are not complete; the total is probably well in excess of 150,000 : and in considering that figure it must be remembered that trials were much prolonged by reason of the fact

that every word spoken in Court, whether spoken in English or Italian, had to be interpreted into the other language.

OF ITALIAN PENAL COURTS IN OCCUPIED TERRITORY

The task of trying this number of cases, in addition to carrying out their many other duties, imposed a severe strain on the legal officers. Every effort was made, therefore, to restore the Italian Penal Courts to working order as soon as possible, so that they could relieve the Allied Military Courts of some work. It is, perhaps, hardly necessary to say that the Italian Penal Courts were not permitted to try, nor had they any jurisdiction to try, persons charged under Allied Military Government legislation: but they could, and did, try persons charged with certain offences which, whilst they might be offences under Allied Military Government legislation, were also offences under the Italian Penal Law.

To restore these Courts to working order was not as simple a task as might be thought. The need for Courts arose, principally, in large urban centres. When such places were occupied it was usually found that the judicial and other staff was dispersed—some, on account of their records and as an act of prudence would have moved northwards and so remained in the territory subject to Fascist control: the others would be scattered in the remote country districts whither they had gone to seek refuge from the Allied bombing. The first task was, therefore, to trace the whereabouts of such members of the staff as were available; each member then had to be 'screened'; those whom it was wished to employ then had to be moved, with their families and possessions, to their new posts; and last, but not always least, it was necessary to find suitable accommodation for the Courts and their records.

In practice, a considerable period of time elapsed before the local courts in any large town or city were able once again to function. However, it should be said that in general the Italian judges and legal staff, though not inclined to endanger their health by over-work, co-operated willingly and loyally and thereby materially lightened the burden of the Allied Military Courts.

OF THE IMPRESSION MADE BY THE ALLIED MILITARY COURTS

It is always difficult accurately to assess the impression made by an organisation with which one is closely associated. This is, perhaps, particularly true in Italy, for the Italian carries politeness to the extreme. The Anglo-American system of taking evidence by examination, cross-examination and re-examination in open court came to most of the Italian legal profession, including the judiciary

and the advocates, as a startling novelty. For them, brought up in the Continental system, it was hard—indeed, at times it seemed impossible—to comprehend even the elements of our procedure, of our rules of evidence or of the art of cross-examination. The writer believes that the Italian legal profession was most favourably impressed by the openness and publicity attending every step in the trial—in such marked contrast to the Italian system: indeed, many Italians expressed the hope that some features of the Anglo-American procedure might be incorporated into the Italian system. There are grounds for hoping therefore, that the Allied Military Courts earned the esteem of the Italians: but, be that as it may, it is certain that the relationship between the Italian Judiciary and Bar on the one hand and the legal officers of the Allied Military Government on the other was, in general, one of very considerable cordiality.

CONCLUSION

The writer, having been intimately concerned with the Allied Military Courts throughout the period covered by this article, and having been largely responsible for their working during the major part of that period, is not in a position to express an unbiased opinion upon their achievements. He would suggest, however, to whomsoever that task may one day fall that the criteria by which their achievements should be judged are two: first, did they contribute in full measure to the fulfilment by the Allied Military Government of its allotted task? and secondly, did they carry out their task in such a way as to earn the respect of the Italian people, judiciary and lawyers? The writer believes that those Britons and Americans who worked so hard to make the Allied Military Courts worthy of their countries can await the verdict of history with some degree of confidence.

EDITORIAL NOTES

THE DEVELOPMENT AND FORMULATION OF INTERNATIONAL LAW

THE Executive Council of the International Law Association has now adopted the Report of its Committee on ' The Development and Formulation of International Law '. The Report, which is signed by Sir Arnold McNair as Chairman, and Dr. C. John Colombos as Convener, will be presented to the Prague Conference of the Association in September, 1947.

The Report draws attention at the outset to the advantages and the limitations which beset the official and the unofficial methods of formulating the principles of international law. The effect of custom and treaty, and of judicial and arbitral tribunals, both international and national, during the past fifty years, in the development of international law, is examined in two opening sections; the problem of codification apart from as well as under the auspices of the League of Nations and the United Nations, occupies three important sections; for purposes of comparison of codification methods the American Restatements of Private Law and the draft conventions prepared by the ' Harvard Research ' are also reviewed. Finally, the Report advances a number of recommendations which may be summarised as follows:—

That, as a first step towards the progressive development and codification of international law, the General Assembly of the United Nations should establish a standing Commission for the Restatement of Public International Law and give to it adequate administrative and financial support;

that the Commission should consist of seven persons, none of whom should be a representative of any Government, and six of whom should be appointed on the recommendation of the International Court of Justice on the ground of their practical experience or scientific knowledge of international law, while the seventh should be the Assistant Secretary-General in charge of the Legal Department of the Secretariat of the United Nations;

that it should be the duty of the Restatement Commission to initiate, plan and co-ordinate the process of the restatement of the existing rules of public international law;

that the Restatement Commission, having examined the available material in the form of conventions, draft conventions, resolutions of scientific bodies, university research publications, the

preparatory work for the League Codification Conference of 1930 and other publications, should prepare a comprehensive programme of work and invite distinguished jurists to act as reporters and advisers upon the different sections of the work;

that, after such consultations with reporters and advisers and scientific bodies as may be considered necessary by it, the Restatement Commission should from time to time authorise the publication of the Restatements as statements of the existing law without assuming responsibility for their particular provisions, and should arrange for their publication in the form of separate volumes and for their periodic reconsideration and, when required, revision;

that the Restatements should not be binding upon the United Nations or any Government or Court, but will, it is expected, exercise a high degree of persuasive authority.

The United Nations Committee has now begun its work on the subject of the Codification of International Law, and its first meeting took place at Lake Success on May 12.

Its task has been considerably helped by the Secretariat on Legal Affairs of the United Nations which, between the closing of the General Assembly in December, 1946, and the date set for the opening meeting of the Committee in May, undertook exhaustive studies in order to draw up a series of memoranda for the information of the Committee to aid it in its discussions. In all some ten documents were prepared. Two documents contained historical information on previous efforts at codification. They presented a detailed account of the conference method up to and including the Hague Conference of 1930 under the auspices of the League of Nations, and the various conferences held under the Inter-American system.

The Secretariat also prepared a memorandum on the methods which the Committee might consider for encouraging progressive development of international law and its codification which it was hoped might be useful as a starting point for discussion in the Committee. Another Secretariat paper listed national and international bodies working in the field of international law and presented an outline of their present composition and activities together with some suggested methods of enlisting their assistance.

At its opening meeting on May 12, the Committee listened to a short introduction by Dr. Ivan Kerno, Assistant Secretary-General in Charge of Legal Affairs, who emphasised the importance of the work, and the difficulties which were confronting it. Dr. Kerno recalled the 'sad story of previous efforts', and mentioned specially the disappointing results of the Hague Conference on

Codification of International Law in 1930. 'We have to be careful', he added, 'not to repeat the mistakes of the past. The Committee should have a new start.'

The members of the Committee are as follows:—

Argentina, Dr. Enrique Serrer Vieyra; Australia, Dr. W. A. Wynes; Brazil, Mr. Gilberto Amado; China, Dr. Shu-hsi Hsu; Colombia, Dr. Antonio Rocha; Egypt, Dr. Wabid Rafaat; France, Prof. Henry Donnedieu de Vabres; India, Sir Dalip Singh; Netherlands, Dr. J. G. de Beus; Panama, Mr. Roberto de la Guardia; Poland, Professor Konstanty Grzybowski; Sweden, Mr. Erik Sjoborg; U.S.S.R., Professor Vladimir Koretsky; U.K. Professor J. L. Brierly; U.S.A., Professor P. C. Jessup; Venezuela, Dr. Carlos Eduardo Stolk; Yugoslavia, Professor Milan Bartos.

The Secretary of the Committee is the well-known Chinese jurist Dr. Yuen-li Liang, the Director of the Division of Development and Codification of International Law.

Sir Dalip Singh, of India, was elected Chairman; Professor Vladimir Koretsky, of the U.S.S.R. and Dr. Antonia Rocha, of Colombia, Vice-Chairmen, and Professor J. L. Brierly, of the United Kingdom, Rapporteur of the Committee.

In its resolution of December 11, 1946, the General Assembly had asked the Committee to give special attention to the principles recognised in the Charter of the Nuremberg trial and in the judgment of the Tribunal. It is a matter of 'primary importance', the Assembly resolution stated, 'that these principles are considered in plans for a general codification of offences against the peace and security of mankind, or of an International Criminal Code'.

In addition to these general responsibilities, the Committee has also to take up a specific assignment which results from another resolution of the General Assembly.

It has to consider the Draft Declaration on the Rights and Duties of States, presented to the Assembly by Panama. The Secretary-General was instructed to refer to the Committee comments and observations on the draft declaration received from Members and from national and international bodies concerned with international law.

The Committee will also be consulted by the Secretary-General on the crime of genocide in accordance with the resolution of the Economic and Social Council of March 28, 1947. This resolution instructed the Secretary-General to undertake, with the assistance of experts in the field of international and criminal law, the necessary studies with a view to drawing up a draft convention in

accordance with the resolution of the General Assembly of December 11, 1946, to the effect that genocide is an international crime, and to consult among others with the Committee on the Progressive Development of International Law and its Codification.

The Committee is to report to the General Assembly at its next regular meeting in September, 1947.

THE ACADEMY OF INTERNATIONAL LAW AT THE HAGUE

After an interruption of eight years, the Hague Academy of International Law is resuming its activities. A four weeks' course which began on July 21, 1947, and at which the lectures were delivered in either English or French, was planned on lines which, as will be seen from the programme set out below, combined the strictly practical with the more purely scholarly approach.

The work was conceived as complementary to that carried on in national universities. There was no fee for the course, and persons wishing to attend were asked to communicate with the Secrétariat du Conseil d'administration de l'Académie de Droit International, Palais de la Paix, The Hague.

PROGRAMME OF LECTURES

Historical Development of International Law.

The Russian doctrine of International Law (five lectures): S. Krylov, Judge of the International Court of Justice.

Principles of Public International Law.

(1) The protection of the Rights of Man in International Law (five lectures): H. Lauterpacht, Whewell Professor of International Law in the University of Cambridge.

(2) Scientific Power and International Law (five lectures): M. Bourquin, Professor of the Faculty of Law of Geneva University.

(3) The present status of non-autonomous communities abroad (five lectures): Baron van Asbeek, Dean of the Faculty of Law of Leyden University.

Private International Law.

The English doctrine of Conflict of Laws (eight lectures): B. A. Wortley, Professor of Jurisprudence and International Law in the University of Manchester.

Administrative Commercial and Economic Law and Related Sciences.

Air Law (five lectures): A. Roper, Secretary-General of P. I. C. A. O., Montreal.

International Organisation.

(1) The San Francisco Charter as related to Public International Law (twelve lectures): G. Kaeckenbeeck, Head of the Service for Peace Conferences and International Organisation of the Ministry of Foreign Affairs of Belgium.

(2) Critical Survey of the work of the League of Nations (five lectures): W. Rappard, Director of the Institut Universitaire de Hautes Etudes Internationales at Geneva.

(3) The Permanent Court of International Justice (three lectures): Manley O. Hudson, Professor at Harvard University.

(4) Regional Groupings and Legitimate Defence (five lectures): J.-M. Jepes, Legal Adviser to the Ministry of Foreign Affairs of Colombia.

International Penal Law.

The Nuremberg Tribunal (five lectures): Donnedieu de Vabres, Professor of the Faculty of Law of Paris University.

THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The Annual Meeting of the American Society of International Law opened at Washington on April 25 and both from the point of view of the subjects discussed and the number of attendances, it proved an unqualified success.

The morning session, Friday (April 25), was taken up with a discussion of the codification of international law. Dr. Yuen-li Liang, Director of the Division of Development and Codification of International Law of the United Nations Secretariat, read an admirable paper on the development of codification projects. He said it was impossible to prejudge the work of the seventeen-man United Nations Committee which was due to meet on May 12 to consider methods and procedures for the codification of international law. Emphasising the importance of the work, Dr. Liang declared that 'with the threat of the atomic bomb hanging over the head of civilised society, the need for a law-governed community of nations has passed from the category of things to be wished for into the more imperative category of things necessary for survival'.

In the general discussion from the floor following the presentation of the paper, Mr. L. H. Woolsey, Honorary Vice-President of the Society and former Solicitor of the State Department, commented at length on the paper read to the Grotius Society in October, 1946, by Sir Cecil Hurst on the Codification of International Law.[1]

[1] See Editorial Note, this *Quarterly*, pp. 38–40.

Dr. Charles Cheney Hyde, President of the Society, presided at the annual dinner. In his presidential address, he proposed an advisory committee to counsel the United States Government on what results might be expected from pursuing any given foreign policy. The Committee, he said, should be ' a small body of highly competent and trustworthy persons not connected with the Government and holding no office '. He pointed out ' it should not give affirmative advice as to what should be the foreign policy of the United States; it should confine its efforts solely to pointing out what would be the probable consequences of pursuing any particular policy that might be contemplated '.

President Truman was unable to attend the dinner and sent a letter of regret. He wrote that in the past year there had been certain heartening developments for world law and justice and cited two instances: The declaration by the United States recognising as compulsory the jurisdiction of the International Court of Justice, and the assize of Nuremberg and its momentous judgment that individuals as well as nations are answerable at law for the planning or waging of wars of aggression and for the commission of other crimes against humanity. ' It is my belief ', the President wrote, ' that the nations of the world and their system of law must aim toward increasing the security of the individual rights of man, as well as the peace and security of the international order '.

Attorney-General Clark, in his address, stated that he was considering inviting the attorneys-general—or their counterparts—to Washington for a conference on legal problems. He stated he had conferred with Acting Secretary of State Acheson and had his approval for such a conference. It may be held in about a year.

Dr. V. K. Wellington Koo, the Chinese Ambassador, in his address, said modern diplomacy seldom made an appeal to international law, and that the first desire of a diplomat was to reconcile conflicting interests.

The distinguished Belgian jurist, Professor Charles de Visscher, was elected an Honorary Member of the Society. The Executive Council of the Society also reported an increase of fifty per cent. of its membership during the past year.

THE PRESENT POSITION OF ' NEUTRAL ' STATES [2]

The neutralised State was a creation of the nineteenth century. The great Powers, striving to preserve the peace and maintain the

[2] Précis of a paper read to the Grotius Society on February 5, 1947, by Mr. W. P. Grieve, M.A., Barrister-at-Law.

balance of power in Europe, sought to prevent small buffer States from being a cause of conflict. The small Powers for their part saw in neutrality or neutralisation their one hope of safety and the one safeguard of their security.

The classic examples of the neutralised State are Switzerland, Belgium and Luxembourg.

The first State to be neutralised was Switzerland, whose neutralisation was accomplished by the Congress of Vienna. Despite the guarantee of the Powers, however, Switzerland owes the maintenance of her status, especially at the beginning, largely to her own efforts and to the skilful diplomacy with which she prevented the Holy Alliance from acquiring a protectorate over the country.

Belgium was neutralised by the Treaty of London of 1831, renewed in 1839. Her neutralisation was the result largely of the efforts of Great Britain to restore the equilibrium in Europe which was destroyed by Belgium's revolt from the Netherlands in 1830. The guarantee of Luxembourg's perpetual neutrality by the Treaty of London in 1867 was likewise due to the desire of the interested Powers to save an important strategic territory from falling into the hands of either France or Prussia. A condition of the guarantee in this case was that Luxembourg was not allowed an armed force.

The system of neutralisation depended on the agreement of the Powers whose honour was involved in their guarantee. How insecure it was was proved by the partition in 1896 of the Republic of Cracow, which had been neutralised in 1815. Moreover, it was not without its critics such as Mazzini, who considered that neutrality was not morally justifiable. The first World War and the breach of Germany's solemn guarantee to Belgium brought a revulsion against the system. Switzerland and Luxembourg continued between the two wars to maintain their neutralised status; but Belgium was freed from the requirement of neutralisation by article 31 of the Treaty of Versailles and by the other Peace Treaties. Luxembourg's position, moreover, was ambiguous. The Treaty of London continued in full force and effect, but the Grand Duchy entered the League of Nations without any reservations, although the constitution which enshrined her neutrality was never changed. With the drift away from collective security in the 1930s, Belgium joined the other small Powers in asserting her neutrality which Great Britain, France and Germany guaranteed. Despite the declaration of the League of Nations Council in 1920 that the conception of the neutrality of members of the League is incompatible with the principle that all members are obliged to co-operate in enforcing respect for their engagements, the League Covenant left certain loopholes for neutrality; and Switzerland was

admitted in 1920 on the special terms that she need not participate in any military action undertaken by the League.

The present war has brought about an even greater revulsion from neutrality as an institution than the last; and has revealed even more clearly that neutralisation is no protection against an aggressive Power. The United Nations Charter goes much further than the Covenant of the League to exclude the possibility of neutrality. The relevant sections are article 2, paragraph 5, and article 4, paragraph 1. Any member may be called upon to participate in any of the measures prescribed by articles 41, 42 and 43, and is thereby precluded from taking up a position of neutrality. This was recognised at San Francisco when, in answer to the French delegation's request that a provision be inserted in the Charter to state that membership was incompatible with neutrality, it was said that that result was achieved by articles 2 and 4. Although the Treaty of 1867 has not been abrogated, it is therefore clear that Luxembourg has abandoned her neutralised status on becoming one of the United Nations. She has recognised the new position by imposing conscription and establishing an army. Should universality ever prevail, all States would equally clearly abandon the possibility of neutrality or neutralisation.

Up to the present, however, many States remain outside the United Nations. It has been argued that paragraph 6 of article 2 of the Charter which enacts that ' the organisation shall ensure that States which are not members of the United Nations shall act in accordance with these principles ' precludes the neutrality even of non-member States. This cannot, however, be so, because the United Nations Charter can no more bind third parties than any other treaty. Hence it is clear that the one and only remaining neutralised State, Switzerland, remains fully neutralised and her guarantors are still bound by their guarantee. In view of the guarantors' obligations under the Charter, the position is evidently not devoid of ambiguities, but these must ultimately be resolved by the impact of fact upon law in the international field. If the United Nations Organisation succeeds and its members compose their differences, all nations will seek admission and neutrality will die a natural death. If it fails, we must expect the small States to seek refuge again in neutrality, tenuous and fragile as is the protection which it offers in the twentieth century.

GERMAN ASSETS IN AUSTRIA

The Foreign Secretary made it clear in the House of Commons on May 14 that the failure of the Moscow Conference to agree on the

terms of a treaty of peace with Austria arose from the lack of a clear legal definition in an earlier international agreement. ' Our failure to agree on an Austrian treaty arose from our inability to settle the question of German assets in Austria. Unfortunately the Potsdam agreement did not define what a German asset was.'

It surely cannot be the case that the necessity of a definition was not realised at Potsdam, though it is easy to be wise after the event. As Mr. Bevin indicated, however, it is likely that the delegations had uppermost in their minds the statement contained in the earlier three-government Moscow declaration that the annexation imposed upon Austria by Germany was null and void, and any changes imposed upon Austria by Germany since the annexation were in no way binding upon the three governments. The Foreign Secretary's further statement that ' in my view it would be wholly inconsistent with the spirit and letter of that declaration to accept as valid all the transference of property which took place after 1938 by the Nazi laws and methods ', must surely find wholehearted endorsement. It would seem to follow that only such transference of property as took place after 1938 in accordance with Austrian law as it stood immediately prior to the annexation should be regarded as sufficient to vest the property in German ownership, though there is the supplementary consideration that from the German point of view such transference should presumably not be regarded as valid unless it was also carried out in accordance with German law as it stood at the time of the transference. Criteria such as these would clearly impose a considerable task upon the authorities responsible for unravelling individual transactions by which property came into German hands. This fact may offer some consolation to those who regret the failure to secure an adequate definition at Potsdam, and they may view with less heartache the decision to refer the matter for solution ' on a factual basis ' by the economists. If, as a further result of this setback, lawyers were to appreciate more fully their rôle in international affairs, and, in the Foreign Secretary's phrase, the importance of ' what the words mean in handling international affairs ', nought but good will eventuate.

AN INTERNATIONAL BILL OF HUMAN RIGHTS

At the United Nations Conference in San Francisco in spring, 1946, a proposal was made to establish a Commission on Human Rights which would promote respect for human rights and fundamental freedoms.

A provision to that effect was then included in the United

Nations Charter (Article 68). Next, the United Nations General Assembly in London approved on January 29, 1946, the report of its Preparatory Commission on the immediate establishment and functions of the Commission on Human Rights.

The first practical step was taken by the Economic and Social Council which in its first session established a nuclear Commission on Human Rights. The Council also approved the Commission's terms of reference.

The nuclear Commission first met at Hunter College, New York City on April 29—May 20, 1946. It considered the functions and composition of the Commission and then reported to the second session of the Economic and Social Council.

The Economic and Social Council in its second session (June, 1946) decided that the Commission should be composed of one representative from each of eighteen members of the United Nations selected by the Council.

The full Commission on Human Rights held its first session at Lake Success from January 27—February 10, 1947.

It decided that the Chairman, together with the Vice-Chairman and the Rapporteur should undertake, with the assistance of the Secretariat, the task of formulating a preliminary draft of the International Bill of Human Rights.

Mrs. F. D. Roosevelt, the Commission's Chairman, then informed the President of the Economic and Social Council (letter, dated March 24, 1947) that she intended to appoint a Drafting Committee of eight. This was approved by the Council on March 28, 1947.

The Commission on Human Rights is composed as follows: Australia, Belgium, Byelorussian Soviet Socialist Republic, Chile, China, Egypt, France, India, Iran, Lebanon, Panama, Philippine Republic, Ukrainian Soviet Socialist Republic, U.S.S.R., United Kingdom, United States, Uruguay and Yugoslavia.

The Drafting Committee on the International Bill of Human Rights, consisting of the members of the Commission on Human Rights for Australia, Chile, China, France, Lebanon, United States, United Kingdom and the U.S.S.R., met at Lake Success on June 9, 1947, and has had under consideration some twenty drafts of such bills from widely different sources. One of them originated with a Government (Cuba), one with an inter-governmental organisation (the inter-American Juridical Committee). Some emanated from private international or national organisations; others were drafted by international lawyers, and by internationally minded writers.

THE UNITED KINGDOM DRAFT

The United Kingdom draft, the more important articles of which are summarised below, was published in June, 1947, and was communicated by Lord Dukeston, the United Kingdom representative on the Commission on Human Rights, to the Secretary-General of the United Nations with a request that it should be laid before the drafting committee. It was made clear that the draft did not represent the final views of His Majesty's Government. The suggestion is made that, when adopting the Bill, the General Assembly should pass a resolution of which the following is the essence:—

'The General Assembly expresses the opinion that human rights and fundamental freedoms can only be completely assured by the application of the rule of law and by the maintenance in every land of a judiciary, fully independent and safeguarded against all pressure, and that the provisions of an International Bill of Rights cannot be fulfilled unless the sanctity of the home and the privacy of correspondence are generally respected and unless at all trials the rights of the defence are scrupulously respected, including the principle that trials shall be held in public and that every man is presumed innocent until he is proved guilty'.

The resolution also provides for the full and accurate information by the United Nations of the position in every land on these matters.

The preamble to the Bill itself states in part:—

'Whereas the just claims of the State, which all men are under a duty to accept, must not prejudice the respect of man's right to freedom and equality before the law and the safeguard of human rights, which are primary and abiding conditions of all just government; whereas the denial of human rights and fundamental freedoms endangers the general welfare and friendly relations among nations, and the enjoyment of such rights and freedoms by all persons must be secured by international law and protected by the organised community of States; whereas it is expedient to define more exactly the aforesaid human rights and fundamental freedoms and to make provision for their universal observance and protection: Now, therefore, the States parties to this International Bill of Rights have accepted the following provisions'.

Then follows Part I of the Bill which reads:—

'Article 1.—The States parties hereto declare that they recognise the principles set forth in Part II of this Bill as human rights and fundamental freedoms founded on the general principles of law recognised by civilised nations.

Article 2.—Every State is, by international law, under an

obligation to ensure:—(a) That its laws secure to all persons under its jurisdiction, whether citizens, persons of foreign nationality or stateless, the enjoyment of these human rights and fundamental freedoms; (b) that any person whose rights or freedoms are violated should have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (c) that such remedies shall be enforceable by a judiciary whose independence is secured; and (d) that its police and executive officers should act in support of the enjoyment of these rights and freedoms.

Article 3.—On receipt of a request to this effect from the Secretary-General of the United Nations, made under the authority of a resolution of the General Assembly, the Government of any party to this Bill will supply an explanation, certified by the highest legal authorities of the State concerned, as to the manner in which the law of that State gives effect to any of the said provisions of this Bill of Rights.

Article 4.—(1) In time of war or other national emergency, a State may take measures derogating from its obligations under Article 2 above to the extent strictly limited by the exigencies of the situation.

(2) Any State party hereto availing itself of this right of derogation shall inform the Secretary-General of the United Nations fully of the measures which it has thus enacted and the reasons therefor. It shall also inform him as and when the measures cease to operate and the provisions of Article 2 are being fully executed.

Article 5.—A failure by any State party hereto to fulfil the obligations under Article 2 is an injury to the community of States and a matter of concern to the United Nations as the community of States organised under the rule of law.

Article 6 deals with the right to report violations of the Bill of Rights.

Article 7.—The parties hereto agree that any one of them which is found by a resolution of the General Assembly adopted by a two-thirds majority persistently to have violated the provisions of this Bill of Rights should be deemed to have violated the principles of the Charter of the United Nations and therefore be liable to expulsion from the organisation under Article 6 of the Charter.'

Part II, which defines human rights and fundamental freedoms, proposes, in Article 8, that it shall be unlawful to deprive any person of his life save in the execution of the sentence of a court after his conviction of a crime for which this penalty is provided by law. Article 9 suggests that no form of slavery shall be permitted.

Article 10 states: No person shall be deprived of his liberty save by an arrest which is effected for the purpose of bringing him before a court on a reasonable suspicion of having committed a crime or which is reasonably considered to be immediately necessary to prevent his committing a crime or breach of the peace.

Article 11 deals with freedom to leave any country, and article 12 puts forward safeguards against retroactive laws. Article 13 safeguards religious freedom.

Article 14 asks that every person shall be free to express and publish his ideas orally, in writing, in the form of art, or otherwise, and that every person shall be free to receive and disseminate information of all kinds, including both facts, critical comment and ideas, by books, newspapers, or oral instruction, and by the medium of all lawfully operated devices.

The freedoms of speech and information referred to may be subject only to necessary restrictions, penalties or liabilities with regard to: matters which must remain secret in the interests of national safety; publications intended or likely to incite persons to alter by violence the system of government, or to promote disorder or crime; obscene publications; publications aimed at the suppression of human rights and fundamental freedoms; publications injurious to the independence of the judiciary or the fair conduct of legal proceedings; and expressions or publications which libel or slander the reputations of other persons.

Article 15 is concerned with the right to assemble peaceably for any lawful purpose, and article 16 with freedom to constitute associations, in whatever form may be appropriate under the law of the State, for the promotion and protection of legitimate interests and of any other lawful object.

The draft finally approved at the first session of the drafting committee will be subject to the following procedure:—

(1) The draft is to be submitted to the second session of the Commission on Human Rights;

(2) Next, the draft is to be transmitted to all States—Members of the United Nations—for their observations, suggestions and proposals;

(3) These observations, suggestions and proposals will then be considered by the Drafting Committee as a basis for a redraft, if necessary;

(4) The resulting draft will be submitted to the Commission on Human Rights for final consideration;

(5) The Economic and Social Council will then consider the Bill with a view to recommending it to the 1948 General Assembly;

(6) The Commission on Human Rights will invite the officers of the Commission on the Status of Women (the Chairman, the Vice-Chairman and the Rapporteur) to be present and participate without vote in its deliberations when sections of the draft of the International Bill of Human Rights concerning the particular rights of women are being considered.

INTERNATIONAL CIVIL AVIATION ORGANISATION
MEETING OF FIRST ASSEMBLY

At the opening of the first meeting of the Assembly of the I.C.A.O., which began in Montreal on May 6, 1947, forty-one States had ratified the Convention on International Civil Aviation (the Chicago Convention) and become members of the organisation. Three more ratifications had been deposited, but the thirty-day period required for the acquisition of membership by these States had not expired. However, the Assembly decided that, as this was merely a matter of routine, they should be entitled to participate and vote as members. In addition, a number of non-member States and international organisations were represented; and at a later meeting of the Assembly, Italy was admitted to membership subject to adherence to the Convention and to the approval of the United Nations.

Thirty days after ratification of the Convention on International Civil Aviation by the requisite minimum of twenty-six States, it became effective on April 4, and the International Civil Aviation Organisation set up by the Convention was established on a permanent basis. Prior to that date the organisation had acted provisionally under the terms of an Interim Agreement concluded in Chicago in December, 1944. During this preliminary period the Council (consisting of representatives of twenty-one States) and all offices in the provisional organisation were on an interim basis; and part of the work of the First Assembly consisted of the election of a new Council (for three years) and the constitution of committees and offices of the organisation on a permanent basis. The Council eventually elected consisted of representatives from Australia, Argentina, Belgium, Brazil, Canada, Chile, China, Czechoslovakia, Egypt, Eire, France, India, Iraq, Mexico, Netherlands, Peru, Portugal, Sweden, Turkey, United Kingdom and U.S.A.

A small Committee (of which the writer had the honour to be Chairman) was set up to formulate the Rules of Procedure of the Assembly, its Commissions and Committees. These rules could not be on a permanent basis (and will consequently require revision at

the next Assembly) because the First Assembly had to deal with proposals and decisions of the Interim Council and the period intervening between April 4, when the organisation became permanent upon ratification of the Chicago Convention, and the meeting of the First Assembly on May 6. The rules proposed by the Committee were adopted by the Assembly. The work of the Assembly devolved upon six commissions, as follows:—

The First Commission (Constitutional and General Policy) dealt with (a) the structure of I.C.A.O. on a permanent basis including its Commissions and Committees; (b) procedure for the election of the Council by the Assembly; (c) agreement with the United Nations; (d) relations with non-contracting States and International Organisations and their participation in future Assemblies; (e) Divisional, Regional and Special Meetings of the Organisation; (f) action by the Organisation relating to Safety in the Air; (g) liaison with contracting States; (h) Languages; (i) Privileges and Indemnities; (j) proposals for amendment of the Convention on International Civil Aviation, and (k) consideration of the status of Poland. The Commission proposed a number of resolutions on these subjects which were subsequently adopted by the Assembly. Among these was a resolution that the meeting of the Second Assembly should be held in Western Europe at the end of May or the beginning of June, 1948.

The Second Commission was concerned with technical matters.

The Third Commission (Economic) spent most of its time attempting to formulate an acceptable Multilateral Agreement on commercial rights in international civil air transport (involving the ' Five Freedoms '), and to devise a formula distinguishing scheduled and non-scheduled services. It was unable to finalise agreement on either of these questions. It dealt also with (a) facilitation of international air transport; (b) economic burdens including insurance and double taxation; (c) statistics; (d) air mail; and (e) agreements filed with the Organisation. In connection with the proposed Multilateral Agreement, contracting States were requested to submit proposals to the Council for study and report to the next Assembly concerning (i) a single organisation to operate the world's international air routes; (ii) organisations to operate trunk services within a given area by combining the national interests concerned, for example, Europe, and (iii) organisations for the international operation of services on individual routes with the object of producing a single international instrument combining all or some national organisations operating on particular routes, for example, Europe to South Africa. It was also resolved that a Commission open to all member States should be convened not later than

October, 1947, in Rio de Janeiro, for the purpose of drawing up for consideration by member States a Multilateral Agreement concerning the exchange of commercial rights in international civil air transport.

The Fourth Commission (Legal) comprised representatives from twenty-three member States, with observers from three non-member States, and from the United Nations, the International Air Transport Association, the International Chamber of Commerce and the Comité International Technique d'Experts Juridiques Aériens (C.I.T.E.J.A.) The work was undertaken partly in full Commission and partly in Committees appointed to deal with (a) drafting of the proposed Convention on the Recording of Rights in Aircraft—Chairman, Dr. E. M. Loaeza, of Mexico; (b) establishment of a Legal Committee and Law Department within the Organisation—Chairman, Major K. M. Beaumont, of the United Kingdom; (c) programme of work of the Legal Committee—Chairman, Dr. A. F. Beheri, of Egypt; (d) procedure for approval and signature of draft Conventions—Chairman, Mr. E. T. Nunneley, of U.S.A.; and (e) interpretation of Chapter XV of the Chicago Convention—no Chairman.

The Commission also dealt with the interpretation of certain expressions used in article 94 of the Chicago Convention, as desired by the Executive Committee of the Organisation.

The constitution of the new Legal Committee of the Organisation proposed by the Fourth Commission, and designed to take the place of the C.I.T.E.J.A., was considered by the First Commission and approved by the Assembly. During the sessions in Montreal, the C.I.T.E.J.A. held two meetings and resolved upon its liquidation after twenty-one years' existence, in view of the fact that its work concerning private international air law (as well as work concerning public international air law hitherto undertaken by the I.C.A.N.) would, in future, be undertaken by the Legal Committee of the Organisation, which would consist of members and representatives similar to those hitherto comprised in the C.I.T.E.J.A. It was proposed that the first meeting of the Legal Committee should be held in Brussels in September, 1947, when its Rules of Procedure (to be drafted in the first instance by the Secretariat) would be approved, and when it was hoped that the proposed Convention concerning the Recording of Rights in Aircraft could be finalised in draft form for submission to all States with a view to its agreement and signature at the next meeting of the Assembly in 1948.

The following matters were included in the programme of the Legal Committee, in addition to settlement of its Rules of Procedure

and of the form of the draft Convention concerning the Recording of Rights in Aircraft, namely:—

Revision of the Warsaw Convention; definition of terms; revision of the Rome Convention and Brussels Protocol; limitation of liability; collision; draft Convention concerning the legal status of the Aircraft Commander; form of Consignment Note for combined transport; draft Convention concerning assistance to aircraft and by aircraft on land; Convention on assistance and salvage of aircraft by aircraft at sea; Authority of Judgments by competent tribunals under Conventions in force on air matters, and distribution of allowances; Hire and Charter; General Average; Remuneration for assistance and postal contribution to such expenses; Abandonment; Jettison; Convention on Precautionary Attachment of Aircraft.

A great deal of time was spent, both in full Commission and in Committee, discussing and attempting to resolve the highly technical and involved questions arising in connection with the proposed Convention concerning the Recording of Rights in Aircraft, a new draft of which had been prepared by a special Committee of the P.I.C.A.O. in Paris in February last, because a Convention of this character is urgently desired, particularly by American operators and banks and financial houses in connection with the financing of air fleets. It was decided to circulate a new skeleton draft Convention to all States together with nine questions of principle, with a request that replies to these might be received as soon as possible. Among these, one of the most important was whether the rights recordable should be specified in the Convention, or whether each ratifying State should be entitled to specify the rights it desired to have recognised as recordable, or whether each State should, when signing or ratifying, be entitled to accept or reject as recordable any rights so specified. Another difficult question is whether rights in spare parts should be recognised as recordable.

This matter, and the other matters referred to above, absorbed all the time available. Consequently it was not possible to proceed further with the draft Convention on the Status of the Aircraft Commander (also prepared by the special Committee of the P.I.C.A.O. last February), or the draft Convention to take the place of the Warsaw Convention which was prepared by the writer following a long meeting of the C.I.T.E.J.A. on the subject at Cairo in November, 1946, and upon which the writer has still to report to the Legal Committee.

In the Constitution of the new Legal Committee, provision is made for the Committee to render legal opinion to the Council

and other components of the Organisation upon request. The Secretariat of the Legal Committee will be provided by a new Law Department to be set up within the Organisation, or by the existing Legal Secretariat which acted as the Secretariat of the Fourth Commission during the meeting of the Assembly.

The Fifth Commission was concerned with the administrative and financial organisation of I.C.A.O.

The Sixth Commission dealt with questions concerning financial and technical aid through the I.C.A.O., including weather ships in the Atlantic and a meteorological station in Iceland.

K. M. Beaumont.

IMPERIAL CONSTITUTIONAL DEVELOPMENTS [3]

SOUTH-WEST AFRICA

Chapter XII of the United Nations Charter establishes an International Trusteeship system to replace the League of Nations system of mandated territories. Article 77 provides that the system shall apply inter alia to territories now held under mandate, but adds that 'it will be a matter for subsequent agreement as to which territories will be brought under the trusteeship system and upon what terms'. Article 79 provides that the terms of trusteeship for each territory 'shall be agreed upon by the States directly concerned, including the mandatory Power in the case of territories held under mandate by a member of the United Nations, and shall be approved as provided by articles 83 and 85'. These articles provide that in the case of territories which constitute strategic areas, the approval of the terms of trusteeship shall be given by the Security Council; in all other cases it shall be given by the General Assembly. By a resolution of February 9, 1946, the General Assembly invited the placing of mandated territories under trusteeship.

The most controversial issue which has yet been dealt with in the light of this resolution and these articles by the General Assembly is the request of the Union of South Africa that the mandated territory of South-West Africa be incorporated in the Union. This request was only made by the Union after the inhabitants of South-West Africa had clearly expressed their own

[3] The Editors propose to continue inserting in the *Quarterly* Editorial Notes on recent constitutional developments within the British Commonwealth and Empire relating to: (a) The International Trusteeship System established by the Charter of the United Nations; (b) The relations between the United Kingdom and the other parts of the British Commonwealth of Nations; (c) External Affairs.

desire for incorporation. On December 14, 1946, however, the General Assembly of the United Nations refused to accede to the Union's request, stating that they considered that the African inhabitants of South-West Africa had not yet secured political autonomy or reached a stage of political development 'enabling them to express a considered opinion which the Assembly could recognise on such an important question as incorporation of their territory'. They recommended that the territory be placed under the international trusteeship system and invited the Union of South Africa to propose a trusteeship agreement for the territory. This the Union has refused to do. Field-Marshal Smuts took the view that since the inhabitants had clearly expressed their desire for incorporation, the territory must, in default of incorporation, contrive to be administered as before. This means that it will continue to be administered as an integral part of the Union in accordance with the principles laid down in the mandate. Field-Marshal Smuts said, however, that in accordance with Article 73 (*e*) of the Charter, the Union Government would 'transmit regularly to the Secretary-General for information purposes, subject to such limitations as security and constitutional considerations may require, statistical and other information of a technical nature relating to the economic, social and educational conditions' of South-West Africa.

It has since been announced in the Union Parliament that the Union Government will shortly introduce legislation with the full agreement of the inhabitants of South-West Africa, to provide for their representation in the Union Parliament. Such representation in no way constitutes incorporation since it is provided for and permitted by the terms of the mandate: similar representation in the French Chamber is accorded by the French Constitution to the former French mandate of the Cameroons and Togoland. Indeed, it is clear, that however unfortunate the present situation may be, the Union Government has acted throughout with a scrupulous regard for the law, and that, in continuing to administer South-West Africa in the terms of the mandate, it is acting in accordance with articles 77 and 79 of the Charter which, as set out above, substitute trusteeship for mandate only after agreement has been reached in regard to the territory in question.

TANGANYIKA, TOGOLAND AND THE CAMEROONS

In accordance with article 75 of the United Nations Charter, which provides for the establishment of an International Trusteeship

system for the administration and supervision of territories placed thereunder, and article 77 whereby the system may be applied to territories formerly held under mandate, His Majesty's Government in 1946 prepared a draft scheme for submission to the United Nations for the Trusteeship of Tanganyika, Togoland and the Cameroons which were then held under mandate.

The general principles of trusteeship are too well known to require detailed treatment. The drafts in respect of the Cameroons and Togoland are in substantially the same terms and differ from that in respect of Tanganyika in that under article 5 (*a*) of the Cameroons and Togoland drafts, the Administering Authority is to administer the territory 'in accordance with its own laws as an integral part of his territory with such modifications as may be required by local conditions and subject to the provisions of the United Nations Charter and this agreement'; whereas under article 5 (*a*) of the Tanganyika Draft, the Administering Authority is given only 'full powers of legislation, administration and jurisdiction in Tanganyika, subject to the provisions of the United Nations Charter and of this agreement'.

The reason for this distinction between the case of Togoland and the Cameroons on the one hand and of Tanganyika on the other is that Tanganyika is a large territory forming a self contained entity, whereas Togoland and the Cameroons are narrow strips of land adjacent to the Gold Coast and Nigeria respectively, and have been administered in the past as integral parts of the Gold Coast and Nigeria, subject to the provisions of the mandates.

NIGERIA

As a result of proposals for the revision of the Constitution of Nigeria made by the Governor in 1945, a new Constitution was enacted in August 1946. The object of the proposals was threefold: to promote the unity of Nigeria, to provide adequately within that unity for the diverse elements which make up the country; and to ensure greater participation by Africans in the discussion of their own affairs.

By the new Constitution, a Legislative Council is created for the whole of the Colony and Protectorate of Nigeria (as opposed to only the Southern Provinces of the Protectorate before) and the Cameroons under British mandate which have been administered as an integral part of Nigeria since 1914. This Council consists of the Governor as President, thirteen ex-official members, three nominated official members, twenty-four nominated unofficial

members and four elected members. Nigeria is divided into three areas: the northern provinces, the western provinces and the eastern provinces. In the northern provinces, a Northern Regional Council has been set up, consisting of a House of Chiefs and a House of Assembly; and in the Western and Eastern Provinces, Houses of Assembly have been instituted. In each of the three Houses of Assembly, there is an unofficial majority. Of the nominated or official members of the Legislative Council, four are members of the House of Chiefs nominated by that House, five are unofficial members of the Northern House of Assembly nominated by the unofficial members of that House, nine are similarly nominated from the Western House of Assembly and five from the Eastern. In addition there are various unofficial members appointed by the Governor and there are four elected members, three for Lagos and one for Calabar. In this way a chain of representation has been created 'from the Legislative Council to the people through the regional councils and the native authorities'. Any member may introduce a Bill in the Legislative Council, but the Governor's assent is necessary before a Bill becomes law, and the Governor may in the interest of Nigeria as a component part of the Empire, declare a Bill to have the force of law which the Council has failed to pass. A member of the Legislative Council may, notwithstanding, make protest in writing against such declaration to the Secretary of State. The annual estimates of expenditure for each region are to be presented to the respective House of Assembly and the House may make resolutions thereon, as may, in the Northern Province, the House of Chiefs. These annual estimates as approved by the Governor, with the resolutions of each House, are to be laid on the table of the Legislative Council on the first day of the meeting of that Council during which the annual estimates for Nigeria are to be considered.

While preserving the overriding power of the Crown in external matters and in internal matters in the imperial interest, the new Constitution marks an important step forward in the education of the peoples of Nigeria, all in varying stages of development, in the art of democratic Government.

A new Constitution has also been granted to the Gold Coast, on similar lines, which will ensure for this territory the benefit of the same gradual advancement towards self-government.

CEYLON

A major development has taken place with the enactment of the Ceylon (Constitution) Order in Council, 1946, under the terms of

which the present State Council will give way to a Parliament consisting of a Senate and a House of Representatives, and the Executive Committees will be replaced by a Cabinet of Ministers responsible to that Parliament and under the leadership of a Prime Minister.

Although the new Order in Council specifies certain classes of legislation which may not be enacted and certain classes of bills which will require to be reserved by the Governor for His Majesty's assent, the new Parliament will, nevertheless, have wide powers so that one can say that Ceylon will shortly become virtually completely self-governing in internal affairs.

His Majesty's Government have retained a control over defence matters and external relations, but it is worth pointing out that the new Order in Council has gone so far as to include in its preamble the extract from the White Paper (setting out His Majesty's Government's decisions regarding Ceylon) touching on the eventual attainment by Ceylon of Dominion status. The hope is in fact expressed that the new Constitution ' will be accepted by the people of Ceylon with a determination so to work it that in a comparatively short space of time such Dominion status will be evolved '.

The portfolios of defence and external affairs are to be held by the Prime Minister; but Bills relating to these two matters are, with certain other Bills, to be reserved by the Governor for the signification of His Majesty's pleasure. Bills relating to external affairs are not in this context, however, to include Bills relating solely to the prohibition or restriction of immigration, or relating solely to, or conforming with, any trade agreement concluded with the approval of the Secretary of State between the Government of Ceylon and the Government of any part of His Majesty's Dominions or any territory under His Majesty's protection or wherein His Majesty has jurisdiction.

His Majesty in Council is empowered to legislate in matters of external Affairs and defence.

SARAWAK

Sarawak, until then a British Protected State, became on May 21, 1946, a British Colony on its cession to His Majesty the King by His Highness Sir Charles Vyner Brooke, the Rajah of Sarawak. The picturesque and enlightened rule of the Brookes which has lasted since 1841 thus came to an end; but the Constitution which the Rajah granted in 1941 to commemorate the centenary of Brooke rule has been in substance retained.

Sarawak was annexed to the Crown by Order in Council of June 16, 1946, wherein it was enacted that from July 1, 1946 'Sarawak shall be annexed to, and shall form part of, His Majesty's dominions and shall be called the Colony of Sarawak'. By Letters Patent under the great seal of even date, paragraph 8, it was laid down that 'the provisions of the constitution of 1941 should, until other provision was made in lieu thereof, remain in and have full force, subject only to the modifications introduced by the said Letters Patent.' Subject only to such variations as Sarawak's new status demand, her laws remain unchanged and the powers of the Supreme Council and the Council Negri are preserved. The Governor in the exercise of his powers and duties, is to consult with the Supreme Council, except in making appointments to the Supreme Council, and in some cases which are either too urgent to permit him to consult them or not sufficiently important, or where His Majesty would thereby be prejudiced.

All laws are to be styled ordinances and are to be 'enacted by the Governor of Sarawak with the advice and consent of the Council Negri'.

NORTH BORNEO

The State of North Borneo which, like Sarawak, had been a British Protectorate since 1888, was ceded to the Crown by its Sovereign, the British North Borneo Company, in June, 1946. On July 10, 1946, this territory together with the adjacent Settlement of Labuan, which had formerly formed parts of the Straits Settlements and then, from April, 1946, part of the Colony of Singapore, was by Order in Council erected into one single Colony of North Borneo.

The Letters Patent of July 10, 1946, constituting the office of Governor and Commander-in-Chief of the Colony, also set up an Advisory Council to consist of certain ex-officio members and of other members to be appointed by the Governor. The Governor may, however, act in opposition to the Advisory Council, and laws made by the Governor in consultation with the Advisory Council may be disallowed by His Majesty through a Secretary of State.

THE MALAYAN UNION AND SINGAPORE

The cession to the Crown of Sarawak and British North Borneo are only part of a large scheme of re-organisation of the British Empire in South-East Asia, which has not yet been completed. Under the Straits Settlements (Repeal) Act, 1946, the Straits Settlements Act of 1886 was to be repealed on a day to be appointed

by His Majesty by Order in Council. On the same day, the Settlements were to be divided into such territories as His Majesty by Order in Council might direct.

On March 27, 1946, the New Colony of Singapore, on the one hand, and the Malayan Union, on the other, were thus created. The Colony of Singapore includes its dependencies, the Cocos Islands and Christmas Island. Under the Constitution of the New Colony, the Governor is assisted by an Executive Council of persons nominated by His Majesty; and there is also established a Legislative Council, presided over by the Governor and consisting also of four ex-officio members, nominated official members not exceeding seven, not more than two nominated unofficial members and not more than nine elected members, who must be British subjects.

The Malayan Union Order in Council has never in its entirety been put into force. It was based on the surrender to His Majesty under the MacMichael agreements of the full power and jurisdiction of the rulers of the Malay States, and provided for a Governor, an Executive Council consisting of the Governor as president and ex-officio, official and unofficial members to a total of forty-two. There was also to be in each State and Settlement a State Council or Settlement Council with power to legislate on local matters, each such Council to be presided over by the Resident Commissioner. Finally there was to be a Control Council of Sultans with advisory functions and a Sultan's Advisory Council in each State with advisory powers and power to legislate on matters of Mohammedan religion. A salient feature of the scheme was the creation of a common form of citizenship for all who regarded Malaya as their real home and as the object of their loyalty.

The opposition to this scheme both in Great Britain and Malaya, however, was such that a working Committee was appointed in July, 1946, consisting of British and Malayan representatives to examine proposals put forward by Their Highnesses the Sultans and the United Malays National Organisation and to work out in detail fresh constitutional arrangements. The results of their researches were published in December, 1946. They recommend that a Malayan Federation be established, with common citizenship, but that the Federation be created by mutual act of His Majesty and Their Highnesses the Sultans, and that the central authority be delegated by the King and the Rulers by their joint action to a High Commissioner. Thus the Chief Justice and the Judges of the Supreme Court should be appointed by the High Commissioner for and on behalf of His Majesty and Their

Highnesses. New State agreements should be made between the Crown and the Rulers, giving the Crown complete control over all the internal affairs of each State and all questions of defence and providing for the appointment of a British advisor in each State whose advice would be accepted on all matters connected with the Government of the State other than matters relating to the Moslem religion and the custom of the Malays. The Federation agreement would make provison for (1) a High Commissioner; (2) a Federal Executive Council; (3) a Federal Legislative Council consisting of the High Commissioner as president and forty-eight members with the States and Settlements strongly represented; (4) a State Executive Council in each State and a Council of State with legislative powers; (5) a Settlement Council in each settlement with legislative and administrative powers; (6) a Conference of Rulers; (7) a Supreme Court and Subordinate Courts; and (8) Federal citizenship.

In connection with this re-organisation, a Governor-General was appointed in May, 1946, with a sphere of authority including the British territories in South-East Asia with which the Secretary of State for the Colonies is concerned. Only Hong-Kong is outside his sphere, but he is to represent the interests of that Colony in matters coming within the purview of the Defence Committee. Among the duties of the Governor-General which are of particular interest are those of encouraging co-operation in matters of common interest between British and foreign territories in South-East Asia and in neighbouring areas, and of maintaining close contact with any representatives who may be established in the area by the Governments of the Dominions, India or Burma.

With regard to the relationship of the various territories with the mother country: on matters of domestic concern the Governors of the Malayan Union and Singapore will correspond directly with the Secretary of State; but on matters of policy wider than those of domestic import, they will communicate with the Secretary of State through the Governor-General. The British Representative in Brunei is directly responsible to the Governor-General.

C.J.C.

THE CONCEPT OF MAN IN ENGLISH PRIVATE INTERNATIONAL LAW [4]

'The revival of interest in the rights of man is symptomatic of our deepest anxieties, so much so that even public international lawyers

[4] Extracts from the paper read to the Grotius Society on April 16, 1947, by Prof. B. A. Wortley, O.B.E., LL.D., Professor of Jurisprudence and International Law in the University of Manchester. The full text will appear in Vol. 33 of the *Transactions of the Grotius Society*.

are becoming increasingly reconciled to the emergence of the human person as a subject of public international law, having rights and duties of his own, whilst private international lawyers who have always been accustomed to deal with human rights on an international plane, welcome the rapprochement between the two branches of international law. In any such rapprochement the English developments of private international law may well set an example to the rest of the world.' It was in this way that Professor B. A. Wortley, Professor of Jurisprudence and International Law in the University of Manchester, introduced his examination of the concept of man in English Private International law.

'How have these developments in English Private International Law come about?' The earliest beginnings are in the work of Bartolus (1314–57) whom Dr. Cheshire has characterised [5] as 'the father of Private International Law . . . the first man to deal with the subject on principle . . . his method consisted in examining separately each legal relation in which a conflict of laws was possible, and then indicating that law which *on the grounds of reason and justice* ought most appropriately to govern the matter.' 'The idea', continued Professor Wortley, 'that the legislation even of the most exalted human rulers was subject to the test of reason, was the great contribution of the Bartolists to human liberty; this idea based on a high concept of man and his destiny has had an enormous effect down the ages, and as Rabel says [6] "The territorial realm of the doctrines of the post-glossators exceeded even the boundaries within which the canon and Roman laws were received as 'written reason', representing the laws of all Christendom". The Anglo-American view of the conflict of laws can be traced back to the Bartolists and the gloss of Accursius on Justinian. Our indebtedness to the founders of our subject is not exhausted today, when the great problem of our time is to reconcile individual liberty with social justice, for, as we have seen, the merest glance into the origins of private international law discloses principles governing an age-old struggle by lawyers for the protection of human rights against unreasonable and unjust claims even of the highest civil power. In this struggle we find the lawyers of the European tradition making their claims depend upon a universal system of law alleged to be closer to the notion of reason and justice than that of their opponents. This, of course, was the basis of the claims of equity in Roman and in English law:

[5] Cheshire, *Private International Law*, 2nd ed., p. 76.
[6] *Conflict of Laws*, Vol. 1, p. 7; Chicago, 1945.

it has more recently been the basis of the judgment at Nuremberg which set aside certain German civil laws as contrary to human rights.[7]

The reversal of elementary values which we have witnessed in recent years has been rendered more easy by the theory that human rights and freedoms only exist as results of State power. This view has never been accepted by practitioners here. We may remember Lord Westbury's famous speech in *Udny* v. *Udny* (1869), L.R. 1 Sc.App. 441, 457, in which he laid it down that personal, as distinct from political rights, depend on domicile. "Political status may depend on different laws in different countries; whereas the civil status is governed universally by *one single principle, namely that of domicile.*" Dicey suggested that Lord Westbury showed a "very characteristic indifference to foreign law"[8] by overlooking the opinion of foreign jurists; and (to a certain extent) the enactments of foreign codes tend to do away with the distinction between domicile and nationality *by making a person's civil no less than his political rights depend, not on his domicile, but on his nationality or allegiance.* I should like to suggest that Lord Westbury, who was born before the Code Napoléon, and called to the Bar in 1823, rightly preferred the European tradition of domicile to the newer system of Napoléon making rights depend upon nationality and reciprocal treaties, a system which has been described by a leading French writer in 1947 (J. P. Niboyet) as a 'retour en arrière'. Nowadays it is of the utmost importance to stress that English courts will always find that a man has a domicile, and only one domicile at a time, so that he may not be denied the rights of his chosen civil status. Summing up the topical advantages of domicile as a basis for rights, Rabel observes[9]: 'There is one more circumstance apt to destroy what usefulness nationality may still have as a criterion for status. Many millions of people have emigrated in the course of the war, in the estimate of some experts as many as thirty millions in Europe alone, and others will do so; millions have also lost their former citizenship or will not be able to prove to which State they belong. In the European countries where the nationality principle had its origin, a formidable intermixture of populations is about to render it obsolete'.

The essential human rights arising from the concept of man,

[7] See Cmd. Paper 6904/4; Judgment of the International Military Tribunal at Nuremberg, pp. 3 and 64, citing article 6 of the Charter, which excludes the defence of compliance with domestic law when it conflicts with human rights.

[8] *Conflict of Laws*, p. 81, note (*a*).

[9] *Op. cit.*, p. 158/9.

as man, rather than as a subject of State continued Professor Wortley, are solemnly safeguarded in the oath taken by our High Court judges on assuming office. This oath is the key to the concept of man in our judge-made private international law. Our judges swear: 'to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will'. Professor Wortley developed in further detail in the main body of his address the three following principles that emerge from the judge's oath. First, English judges do in fact try to do right 'to all manner of people' coming before them, by minimising the effects of any unfree status which a foreign domicile may appear to engender. Second, the judges attempt to 'do right . . . after the laws and usages of this realm', *i.e.*, after the English conception of retributive justice, when estimating the damages for wrongs suffered abroad; and third, they take up cases without fear or favour, affection or ill-will, when their views of right and conscience demand it.

REVIEW OF CASES

LAW APPLICABLE TO THE ADMINISTRATION OF ESTATES ABROAD. DOCTRINE OF RENVOI

Re the Sixth Duke of Wellington, deceased
Glentanar (the Executor) v. Wellington

The Facts.

In January, 1812, following the storming of the fortress of Ciudad Rodrigo, the first Duke of Wellington, then Viscount Wellington, was created a Grandee of Spain of the first class for himself and his successors, free of nobility duties and fees, with the title of Duke of Ciudad Rodrigo. A deed of February 5, 1812, carrying into effect the Royal Decree of January 30, 1812, provided that the Grandeeship of Spain and the Dukedom of Ciudad Rodrigo should be enjoyed by him and his issue, successors male and female each in his time in perpetuity. By a deed of July 22, 1813, it was provided that ' there be adjudicated to the Duke of Ciudad Rodrigo for himself, his heirs and successors the Royal Site and possession known in the plain of Granada as the Soto de Roma including therein the lands called the Chauchinas which are found situate within the same boundaries of the Soto in order that they may hold and enjoy it in conformity with and subject to the Constitution and the laws '. The first Duke of Wellington was created Duke of Wellington in the peerage of the United Kingdom in the year 1814.

Upon the deaths of each of the first five Dukes of Wellington, the Spanish estates passed to his successor in the Dukedoms under his testamentary disposition, as each of them gave these estates to his successor either by name or by a gift to the person who should upon his death become Duke of Wellington and Ciudad Rodrigo. Until the death of the testator, the sixth Duke of Wellington, this form of gift caused no difficulty, as there could never have been any suggestion that the Spanish Dukedom passed to a person other than the person who succeeded to the Dukedom of Wellington.

The sixth Duke of Wellington was killed in action in September, 1943, domiciled in England and a British national. He was a bachelor and left a mother (the Dowager Duchess of Wellington) and a sister. He held the English Dukedom of Wellington and the Spanish Dukedom of Ciudad Rodrigo, to which latter title his sister

succeeded, under Spanish law, on the Duke's death. He was succeeded in the Dukedom of Wellington by his uncle, as seventh Duke (hereinafter called the present Duke). The Duke owned property in Spain consisting of (1) immovable estates, (2) arrears of rent due in respect of such estates, (3) live and dead stock and other chattels all upon the said estates, (4) certain other chattels, and (5) bank balances.

The Duke left two wills. The first (hereinafter called 'the Spanish will'), dated May 6, 1942, was executed in the presence of a notary public and seven witnesses. It purported to give all the Duke's property in Spain under heads (1), (2) and (3) to the person who on his death should become Duke of Wellington and of Ciudad Rodrigo absolutely. The second (hereinafter called 'the English will'), dated December 6, 1942, revoked all previous testamentary dispositions except the Spanish will and declared this—the English—will to be his last will 'save as regards the property which is disposed of by my Spanish will which property so disposed of is not intended to be disposed of or dealt with by this my will'. Each of the two wills was in the English language and form, was executed in England, and was validly executed under English law. The two wills were proved on October 13, 1944.

The English will was mainly directed to disposing of assets in England, but it included the following dispositions:—

The Duke, in clause 3, bequeathed to his trustees (inter alia) all if any moneys and other personal or movable property in Spain belonging to him at his death which do not pass under the Spanish will, upon trust for the person who upon his death would become Duke of Wellington. In clause 5 he gave all his property, real and personal, not thereby or by any codicil thereto otherwise specifically disposed of, to his trustees upon the administration trusts contained in Form 8 of the Statutory Will Forms, 1925, which form was incorporated therein. In clause 6 he directed that his trustees should hold the investments and property hereinbefore by reference to the said form directed to be made, or authorised to be retained, including assets for the time being unconverted upon trust for the person who upon his death should become Duke of Wellington absolutely.

The present summons was issued to determine, first, whether upon the true construction of the Spanish will and the English will, and in the events which had happened, the present Duke and the Lady Anne Rhys (the deceased's sister) or either, and if so which of them, was entitled to (a) the movable property, and (b) the immovable property comprised in the Spanish will, or whether the testator died intestate as to the whole or any part of such property; and

secondly, if there was to any extent an intestacy, who was entitled under such intestacy.

Judgment (Chancery Division, May 7, 1947).

Mr. Justice Wynn-Parry developed his judgment as follows:—

'As the property with which I am concerned consists of foreign movables and immovable property situate abroad, the first point which arises for consideration is the choice of law to be applied in the determination of the questions of succession to which I have referred. As regards the movable property in Spain no difficulty arises. The testator died domiciled in England, and it is the clear rule of English law, for which at this date no authority need be cited, that the distribution of the distributable residue of the movables of a deceased is in general governed by the law of his domicile at the time of his death. As there are present in this case no circumstances to take it out of that general rule, it follows that the questions of succession to the movable property of the testator comprised in the Spanish will must be determined by English law.

'I turn now to the question by what law are these questions of succession to be determined so far as concerns the immovable property of the deceased. This point presents more difficulty. The first step, it is true, is easy. According to English law, the devolution of the immovable property situated in Spain comprised in the Spanish will is to be governed by Spanish law as the lex situs. The second step also appears to me to present no difficulty. For when it is asked whether by the phrase 'Spanish law' is meant only the internal law of Spain or the whole of the law of Spain, including therein the body of rules of private international law recognised and administered by its courts, the answer is, in my judgment, at any rate so far as this court is concerned, conclusively provided by the following passage from the judgment of the Privy Council in *Jaber Elias Kotia and Another* v. *Katr Bint Jiryes Nahas*, [1941] A.C. 403, at p. 413: "In the English courts phrases which refer to the national law of a propositus are prima facie to be construed, not as referring to the law which the courts of that country would apply in the case of its own nationals domiciled in its own country with regard (where the situation of the property is relevant) to property in its own country, but to the law which the courts of that country would apply to the particular case of the propositus, having regard to what in their view is his domicile (if they consider that to be relevant) and having regard to the situation of the property in question (if they consider that to be relevant)".

'Though obiter dictum, this "was put forward as a statement of the law of England upon this point, and it is supported by an impressive body of judicial authority, of which reference may be made to *Collier* v. *Rivaz* (1841), 2 Curteis 855; *Casdagli* v. *Casdagli*, [1918] P. 89, and the dissenting judgment of Lord Justice Scrutton at p. 111 approved by the House of Lords in the same case ([1919] A.C. 145); *Re Ross*, *Ross* v. *Waterfield*, [1930] 1 Ch. 377, and *Re Askew*, *Marjoribanks* v. *Askew*, [1930] 2 Ch. 259". It is at this point that the real difficulty on this part of the matter arises. What is the law which would be applied by the Spanish court, if on the facts which I have stated, the questions as to the devolution of the Spanish property which I have to decide were being decided by that court? As will emerge later in this judgment, the question comes down to this: does Spanish law recognise and apply the doctrine of renvoi? It is not a difficult question to state, but it is not easy to answer'.

His Lordship next passed to a consideration of the evidence of the expert witnesses in the case. Both agreed that 'there is no express provision in the Spanish Civil Code, nor any express decision of the Supreme Court, upon the question of the applicability of the doctrine of renvoi in Spain'; but they arrived, upon this matter, 'at diametrically opposed conclusions'.

Mr. Justice Wynn-Parry proceeded: 'The relevant articles of the Spanish Civil Code provide as follows: Article 9: "Laws relating to family rights and duties or to the status, condition or legal capacity of persons, bind Spaniards though resident in a foreign country". Article 10: "Movables are governed by the law of the country of their owner; immovables by the law of the country where they are situate. However, intestate successions as well as testamentary successions shall be governed, as regards the order of succession, inheritance rights, and intrinsic validity of the dispositions, by the national law of the person whose succession it is, whatever be the nature of the property and the country in which it is situate".

'The phrase "national law" in article 10 is not defined in that article or elsewhere in the Civil Code. It appears to me, as matter of construction of the language of the article, that it would be possible to interpret the phrase either as meaning the internal law of the nationality or as meaning the whole of the law of the nationality including its rules of private international law. It is to be observed that the phrase occurs in the second paragraph of the article in a provision which constitutes an exception to the general rule contained in the first paragraph, and which appears to have as its object the establishment of the rule that as regards succession all

forms of property shall be governed by the same set of rules. This provides a context on the face of the article leaning in favour of the view that by " national law " is meant the internal law of the law of the nationality. It is not, however, decisive of the matter.

' It appears to me to be established by the evidence that in its development Spanish law was much influenced by the continental doctrine of the statutes—in Spanish the " doctrina de los Estatutos " —under which a foreigner was accompanied by his civil status and capacity, and the laws of his country had to be applied to him when those laws were not opposed to the principles of public order and the interests of the nation in which his claims were formulated. This rule was recognised by the Supreme Court of Spain in two decisions of January 13 and May 12, 1885, and by a subsequent decision of May 26, 1887—that is, before the Civil Code was promulgated in 1889. I am further satisfied that the only law recognised by that doctrine was the internal law of the lex patriae. It is also established by the evidence that under Spanish law the estate of a deceased person is one and universal wherever the assets are situate and whatever be their nature '.

At this point his Lordship referred to the work by Señor Castan, the President of the Supreme Court of Spain, on *Spanish Civil Law—Common and Regional*, 1936, Vol. 1, pp. 70–71: ' Rights of Succession—By virtue of the rule laid down by the second paragraph of article 10, intestate and testamentary successions shall, as regards the order of succession and nature of succession rights and intrinsic validity of the dispositions, be governed by the law of origin of the person whose succession is in question, whatever be the nature of the property and the country in which it is situate. The personal law of the deceased applies, therefore, to all questions appertaining to the material rights in the succession or (which is the same) to the fundamental rules thereof even if the forms and formalities of the acts referring to the same are governed, as we shall see, by the law of the place where such acts take place. The withdrawal of successions from the real statute is a novelty of the Civil Code taken from the Italian Civil Code, and is based on the necessity of maintaining the unity of the succession and of preventing the estate from being divided into so many different portions as there may be territories in which the assets may be situate '. Mr. Justice Wynn-Parry further referred to the work of Professor Trias de Bes, Professor of International Law at Barcelona University, *Private International Law—Positive System of Spanish Law*, 2nd ed., 1939, at p. 31: ' Paragraph 2 of the said article 10 contains—commencing with the word " However ", which implies an exception to the statutory distinction—the literal transcription of

article 8 of the Italian Civil Code. . . . This principle is beyond reproach because the whole matter of succession in its widest sense is governed wholly in Spain by the national law of the deceased adopting the principle of the unity and universality of the succession'. His Lordship referred finally to *The Dictionary of the Spanish Administration*, by Alcubilla, 6th ed., Vol. 3, p. 676: 'The solutions and opinions of authors who write on international law in regard to the statute to be applied in questions of succession can be condensed into these three: (1) to apply either the law of the last domicile or the national law of the testator; (2) to follow the rule of the lex rei sitae both for movables and immovables, and (3) or mixed, that is to say, to govern immovables by the real statute and the movables either by the law of domicile or by the law of the nation of the testator. The Spanish Code, taking its inspiration from the principle of the unity of succession and the principle of the statutes, accepts the solution of the Italian Code, thus avoiding the difficulty and absurdity of dividing the unity of the succession and the possibility that within a universality of succession there should arise a plurality of estates where there is only one deceased involved, because possibly the territories in which the assets are situate may be several'.

His Lordship continued: 'In my view, the object of the second paragraph of article 10 of the Spanish Civil Code is to preserve the principle of the unity and universality of the succession, and it is for that reason that in case of succession, the lex patriae is substituted for the lex domicilii and the lex situs. Again I say that that does not conclude the matter, but, if I am correct in my reasoning so far, I have ascertained a circumstance which may well assist in answering the questions which I have to answer. Indeed, if the matter rested there, I would say that it would be contrary to the spirit and intendment of the Spanish Civil Code to hold that in questions of succession Spanish law should recognise and apply the doctrine of renvoi'.

At this point Mr. Justice Wynn-Parry referred to the only two Spanish cases upon the subject; the first, decided on June 30, 1900, by the Juzgado de Hospital, Barcelona (Clunet, *Journal de droit international privé*, Vol. 28, 1901, pp. 905 and 911); the second, on February 7, 1925, by the Court of Appeal of Granada, a decision reviewed by the Supreme Court on February 10, 1926. His Lordship considered in particular the last paragraph in the first judgment: 'Considering that there is not any ruling in Spain which can settle this conflict, one ought, therefore, according to article 10 of the Civil Code, to refer to established custom or to the general principles of law, and in this case, following the opinion of

the different jurists and according to the advice of Professor D. Juan de Dios Trias, there is not the slightest doubt that the succession ought to be governed by the law of Catalonia, as the property left by him was situated in Barcelona', and pointed out that he could not consider it satisfactory: 'In the first place, I find in article 10 no direction to refer to established custom or the general principles of law, whatever the latter phrase may mean; in the second place, no custom or general principles of law are referred to; in the third place, the evidence before me showed that the weight of juristic opinion at the present time is not in favour of applying the doctrine of renvoi, and I am quite unable to assume that in 1900 juristic opinion was unanimous or anything like unanimous in favour of its application; and in the fourth place, it is clear that the court was really influenced by the particular opinion referred to. The decision is not one which binds any other Spanish court, and a fortiori not the Supreme Court. I am free, in my endeavour to expound the law, as I consider it would be expounded by the Supreme Court of Spain, to decline to follow that decision, and finding it unsatisfactory for the reasons I have given, I do not propose to follow it'.

Referring to the second case and to the question whether or not the Supreme Court had expressly or by implication expressed its disapproval of the conclusion of the Court of Appeal of Granada that Spanish law rejects the doctrine of renvoi, his Lordship concluded that it did not do so. Considering the judgment of the Court of Appeal of Granada itself, his Lordship found it unsatisfactory, and could not accept, for example, that in the year 1925 'the theory of renvoi has been accepted exceedingly rarely'.

'In this state of the evidence I am thrown back upon the wording of article 10 of the Civil Code, containing in its language the pointer to which I have referred, the insistence of the Spanish law of succession upon the principle of the unity and universality of the succession, the extent to which, before the introduction of the Civil Code in 1889, Spanish private international law had been influenced by the doctrines of "los estatutos" with its insistence on the internal law of the lex patriae; the circumstance that, to put it no higher, there exists a strong cleavage of opinion among Spanish jurists of whose views the Spanish judges will take cognisance for the purpose of making up their minds on a question such as this in regard to which no binding authority exists; and that of those who were cited before me, the majority consider that Spanish law would not apply the doctrine of renvoi, and include in their number the President of the Supreme Court. Basing myself upon this material, I come to the conclusion that it would be against the spirit and intendment of the Spanish Civil Code to hold that in a case such as

this, Spanish law would accept the renvoi which the English law makes to it on the lex situs. I therefore hold that, according to Spanish law, the questions raised by this summons as to the devolution of the immovable property in Spain of the testator must be resolved by reference to English law.'

Turning to the Spanish will, his Lordship held that the gift therein to the person who became Duke of Wellington and Ciudad Rodrigo failed, inasmuch as no person fulfilled both qualifications. He continued: 'The question then arises whether the Spanish movable and immovable property is disposed of by the English will or is undisposed of', and held that the words in the English will 'save as regards the property which is disposed of by my Spanish will which property so disposed of is not intended to be disposed of or dealt with by this my will' meant '*effectively* disposed of by my Spanish will', so that the Spanish property, movable and immovable, which is comprised in, but ineffectively disposed of, by the Spanish will, passed to the present Duke under the English will, the movable property under clause 3 and the immovable property under clauses 5 and 6.

With regard to the submission made on behalf of the defendant, the Dowager Duchess of Wellington, that the English will was ineffectual to pass the immovable property in Spain because by that will it is subjected to certain trusts, that Spanish law does not recognise trusts, that consequently the present Duke could not make a title to the Spanish immovable property under the English will, and that therefore the defendant took the whole of the Spanish immovables as upon an intestacy, his Lordship considered the expert evidence. This showed that Spanish law does not recognise the doctrine of trusts as understood in English law, and that it is not possible to obtain registration of a trust in Spain. It further showed, however, that the mere presence of the word 'trust' in a document of title would not of itself be fatal to registration, and that assuming English law to be applicable in the case in question, the registrar and, if necessary, the Spanish court, would seek competent English opinion as to the effect of the document in question. If the English opinion were that the effect, for instance, of a devise to A in trust for B was to confer on B an immediate beneficial interest, the document would confer a good title on B, notwithstanding the presence of the word 'trust'. In the present case the trustees hold the Spanish immovable property for the limited purpose of due administration, and subject thereto for the present Duke absolutely.

His Lordship concluded: 'In my judgment, upon the true view of the expert evidence, the interposition of the administrative trusts

before the absolute gift to the present Duke does not make the English will ineffectual to pass the Spanish property. In my judgment the present Duke is entitled to the Spanish movable and immovable property comprised in but ineffectually disposed of by the Spanish will '.

UNCONDITIONAL SURRENDER OF GERMANY. STATUS AS STATE. CONTINUING STATE OF WAR. ALIEN ENEMY. APPLICATION FOR WRIT OF HABEAS CORPUS

R. v. *Bottrill, ex p. Kuechenmeister*

The Facts.

Carl Walter Kuechenmeister, a German national, applied to the Divisional Court for a writ of habeas corpus to be directed to the respondent, Lt.-Col. Edward Richard Bottrill, Commandant of the Internment Camp at Beltane School, Wimbledon. The applicant stated in an affidavit that he came to England in 1928 and was granted the right of permanent residence in 1931. He subsequently married an Englishwoman by whom he had three children, all of whom were born in England. He applied for British nationality in May, 1939. In the following August he was asked by the Home Secretary to leave the country. He went to Eire, remaining there until December, 1939, when he was informed by the Home Office that he might return to England to appear before an advisory committee on the question of his internment. He returned to England and was sent for internment to Australia where he remained until 1945. On his return to England in 1945 he was sent on arrival to the internment camp at Beltane School.

At the hearing of the application before the Divisional Court a certificate dated April 2, 1946, from the Secretary of State for Foreign Affairs was produced by the Attorney-General. It stated ' (1) That under paragraph 5 of the preamble to the declaration, dated June 5, 1945, of the unconditional surrender of Germany, the governments of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics and France assumed " supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command, and any State, municipal or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany ". (2) That in consequence of this declaration Germany still exists as a State and German nationality as a nationality,

but the Allied Control Commission are the agency through which the Goverment of Germany is carried on. (3) No treaty of peace or declaration by the Allied Powers having been made terminating the state of war with Germany, His Majesty is still in a state of war with Germany, although, as provided in the declaration of surrender, all active hostilities have ceased'.

The Divisional Court held that the certificate was conclusive as to the matters it purported to certify [1]; the applicant remained in consequence an alien enemy notwithstanding the unconditional surrender of Germany; and that as an alien enemy interned in this country, he could not apply to the court for a writ of habeas corpus.

The Judgments (on appeal).

Scott, L.J.—'The Divisional Court has held that the applicant is not entitled to a writ of habeas corpus, and the ground of the decision is that he is an alien enemy and, as such, lawfully detained by the Crown. The applicant's counsel submitted that the applicant, who was admittedly still an alien, was not an alien enemy. On this, his essential proposition was that the declaration at Berlin of June 5, 1945, by the United Nations, ended the war, with the result that the applicant, who was a natural-born German and had never lost that nationality, although he had lived in England for many years, married an English wife and had children by her, ceased thereupon to be an alien enemy. That contention had much theoretical support in international law, in that the central German Government of Germany was thereupon displaced, and its place completely taken by a government composed of the four United Nations. War predicates at least one other State against which the war is waged, and the Declaration of Berlin ended Germany, for the time being, as a separate State. In support of that proposition he argued that a sovereign State which has no sovereign government is a contradiction in terms; and that, even if such a State be possible in international law, a State which has no national government cannot wage a war or be at war. He further contended that, although the Secretary of State for Foreign Affairs had, on April 2, 1946, certified in the present case that the war was still continuing, and although counsel conceded that prima facie such a certificate was, on well-recognised principles, normally binding on the court, it was not binding on the facts of the present case, because the declaration of Berlin was

[1] Cf. *Duff Development Co., Ltd.* v. *Kelantan Government*, [1924] A.C. 797; *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149.

the act of the King, and that act was conclusive that the King's Secretary of State for Foreign Affairs had no authority thereafter to certify that the war was still going on. This argument at first sight seems formidable, but in my opinion it rests on a fallacy, which can be stated thus: In the British constitution, which is binding on all British courts, the King makes both war and peace, and none the less so, in the eye of the law, that he does so as a Constitutional monarch upon the advice of his democratic Cabinet. If the King says by an Act of State that the Commonwealth of countries over which he reigns is at war with a particular foreign State, it is at war with that State, and the certificate of the Secretary of State is conclusive; and I do not deviate in order to consider the Constitutional position of Eire, which I regard as anomalous. When the King makes peace with an enemy State, that war comes to an end, but it does not come to an end before that peace is made. Whether international law has a different rule is irrelevant; for international law is only binding on our courts in so far as it has been adopted and made part of our municipal law; and the above propositions go, in my opinion, as far as our municipal law has gone.

'It follows, therefore, that the Certificate of the Secretary of State for Foreign Affairs, which says in terms that we are still at war with Germany, is binding at least in our municipal law, and therefore on all the King's courts. Had it been otherwise, I should have been disposed to hold that the authority of the Secretary of State for Foreign Affairs at any date subsequent to His Majesty's declaration made through his plenipotentiaries at Berlin in June, 1945, was limited by that declaration. For the reasons which I have given, however, I am satisfied that an inference from the declaration, that the King had then brought to an end the state of war, would be erroneous. In our municipal law, whether it differs from international law or not, a state of war can continue, and the war with Germany is continuing, in spite of the fact that Germany thus ceased to have any independent central government. The above was the point on which the applicant's appeal mainly rested, and on it I am satisfied that the judgment of the Divisional Court is right.' With regard to the applicant's alternative argument, which was in effect that though the decided cases made it impossible to argue on behalf of a prisoner of war that he had, as against the Executive, any right to a writ of habeas corpus in order to vindicate his right of freedom of residence within the United Kingdom, yet the mere fact of enemy nationality was no bar to that writ, and internment in a camp by the Executive did not of itself make an alien enemy

a prisoner of war, see *R.* v. *Superintendent of Vine Street Police Station, ex p. Liebmann*, [1916] 1 K.B. 268, which had in effect decided against this argument.

Lord Justice Scott continued: 'The King, under our Constitution, is under no obligation to admit into the United Kingdom, or to retain here when admitted, any alien. Every alien in the United Kingdom is here only because his presence has been licensed by the King. It follows that at common law, the King can at will withdraw his licence and cause the Executive to expel the alien, whether enemy or friend: see *Att.-Gen. for Canada* v. *Cain*, [1906] A.C. 542, 546, where Lord Atkinson said: "One of the rights possessed by the Supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order and good government, or to its social or material interests". That legal position is not affected by the political consideration, for which this country has in past history justly gained a good reputation, that it is our practice both to welcome alien visitors and, indeed, to give asylum to political refugees. How far the common law position is affected by the series of statutes passed about alien friends it is unnecessary to consider, for the Prerogative was not affected by them as regards alien enemies. Even an alien enemy may live here in perfect freedom under the King's licence . . . but, on withdrawing that licence, the King may intern, or even expel, the alien enemy. If in time of war he decides through his appropriate officers of State, primarily the Home Secretary, that considerations of public safety make that course necessary, I think that the alien enemy so interned ipso facto becomes a prisoner of war; but in my opinion, the establishment of that status is not a condition precedent to the power of the King to expel any alien enemy. Whether the applicant was or was not, is or is not, a prisoner of war is irrelevant in the present appeal. In truth I can see no halfway house cognisable by the common law between a complete discretion vested in the Royal Prerogative and a concession to alien enemies of rights equivalent to those of British subjects of the King at common law or of alien friends granted to them by statute; and in their case, it must be remembered, the necessity for control measures called for legislation and defence regulations. What measures should in time of war be taken by the Executive in the case of alien enemies, must, it seems to me, necessarily rest in the discretion of the Executive, and the courts must not be tempted into finding reasons for

controlling the Executive by the possibility of hardship which may be present in an individual case or can easily be imagined.

'Some argument was addressed to us on the footing that aliens residing within the realm under the licence of the King, whether friend or enemy, enjoy the normal rights of subjects of the King in his courts, because they are here within his protection, and therefore owe to him some degree of allegiance. If, then, an alien enemy may so sue and be sued, why should he not be entitled to his writ of habeas corpus? The answer is plain: as against a subject, or another alien, or any *persona juridica* there is no disqualification; but, if he seeks the writ in order to vindicate his own freedom from control by the Executive, he is necessarily challenging the very right to control him which is vested under our Constitution in the discretion of the King. The argument is therefore wholly beside the point.'

Lord Justice Tucker and Lord Justice Asquith gave further reasons for their opinion that the appeal must fail. The appeal was dismissed with costs.

[*Law Reports*, January, 1947, King's Bench Division, p. 41.]

WILFUL REFUSAL TO CONSUMMATE MARRIAGE—JURISDICTION—CHOICE OF LAW

Robert (otherwise De La Mère) v. *Robert*

The Facts.

In February, 1940, a ceremony of marriage was gone through by the parties at the Registry Office at St. Peter Port, Guernsey. The respondent was in the Royal Air Force and had to leave the island the same day. The marriage was not consummated. At a later date the petitioner escaped from the island, then under German occupation, and got to England. There she met the respondent, who refused to live with her. The petitioner was resident in England from December, 1942, to February, 1946, when she returned to Guernsey. In October, 1945, she presented a petition for nullity on the ground of wilful refusal to consummate the marriage, or in the alternative, incapacity. Unbeknown to the petitioner the respondent had returned to Guernsey before the petition was presented.

The Judgment.

In a reserved judgment Mr. Justice Barnard referred to *White (otherwise Bennett)* v. *White*, [1937] P. 111, as extending the

jurisdiction of the Ecclesiastical Courts to include a case where the petitioner was domiciled and resident in England, although the respondent was both domiciled and resident abroad. In the present case the petitioner was resident but not domiciled in England, but it was clear from the authorities that that sufficed to give the court jurisdiction.

Of the lex fori, the lex loci celebrationis and the lex domicilii, his Lordship considered the lex loci celebrationis applicable to the case, since wilful refusal to consummate a marriage, in order to be justified on principle as a ground for annulment and not dissolution, must be considered as a defect in marriage, an error in the quality of the respondent. On this basis, the law applicable was that stated in *Berthiaume* v. *Dastous*, [1930] A.C. 79, 83: 'If there is one question better settled than any other in international law, it is that as regards marriage—putting aside the question of capacity—locus regit actum. If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicile would be considered a good marriage'. Wilful refusal to consummate being a ground for a decree of nullity by the law of Guernsey the petitioner was entitled to a decree nisi of nullity.

[Reported in *Weekly Notes*, June 7, 1947, p. 162.]

BOOK REVIEWS

The American Journal of International Law, Vol. 40. [Published by the American Society of International Law, Washington. 1946. 889 pp. and Documents Supplement 136 pp.]

The American Journal of International Law needs no introduction. Indispensable for reference, it has long been established as among the most significant contributions made annually to international law. The volume for 1946 maintains the high standard set by its predecessors. Unfortunately, it is only possible in the space available to note among the twenty long articles and some forty Editorial Comments and Current Notes those contributions which deal with matters of topical and more general interest.

A fair proportion of space is devoted to the United Nations and its organs. Walter H. C. Laves and Francis O. Wilcox contribute a useful summary of the principal issues which occupied the General Assembly at the First Part of its First Session in London. Reference should also be made to Louis B. Sohn's study of 'Multiple Representation in International Assemblies'. He examines the practice of international organisations in the past, and doubts whether the United States were justified in relinquishing their claim to additional votes in the General Assembly. Realising the difficulty of drawing a parallel between the States of the United States and the British Dominions, or even the Soviet Republics, he is driven to advocate a system of weighted votes proportionate to size and strength—a system which would seem to raise more difficulties than it would solve. Gustav Pollaczek's interesting study of 'The United Nations and Specialised Agencies' stresses the part which UNESCO could play in spreading the understanding and knowledge of the work already carried out by international organisations in the economic and social fields.

Several articles deal with the Security Council and the International Court. Clyde Eagleton analyses the 'Jurisdiction of the Security Council over Disputes'. He takes the view that the Security Council has an unlimited right of consideration and discussion which no individual member alone can prevent. Not all, unfortunately, notably the Soviet group, accept this view of the Yalta Formula. The Russian interpretation seems to be that discussion of a question 'in substance' can only take place if the Security Council first decides under article 34 that a dispute or situation of the kind there contemplated has arisen—a decision which can be prevented by the veto of a permanent member. Or in the words of the Australian criticism of the Yalta Formula at

San Francisco, as interpreted by the Sponsoring Powers, the Council can only discuss without veto 'whether a dispute can be discussed and can only investigate whether it can be investigated' (Documents of the United Nations Conference on International Organisation, Vol. II, pp. 438–440). In the case of Iran, however, Dr. Eagleton comes to the conclusion that the interpretation of Chapter VI of the Charter by the Secretary-General in his Memorandum to the Security Council was right, and that the Security Council was wrong in voting its resolution on the issues between Iran and Russia without first founding its jurisdiction on a decision that the matter was a dispute or situation within the meaning of article 34, even though the latter decision could in all probability never have been reached in face of the requirement for the concurrent vote of Russia.

The International Court is discussed by Manley O. Hudson in his 'Twenty-Fourth Year of the World Court'. Judge Hudson's contributions on the court have appeared annually since 1923. The present article contains an account of the creation of the International Court, 'a new court so closely resembling the old one that the chain of continuity need not be broken'. A detailed analysis of the old and new Statutes shows graphically by means of underlining and brackets how little substantial change there has been, and gives the reason for the changes where such have taken place. The decision of the United States Government to accept compulsory jurisdiction of the International Court receives full discussion in this volume.

The Head International Relations Analyst of the Library of Congress, Francis O. Wilcox, deals with the proceedings before the Senate on the discussion of the Morse Resolution and the amendments to it ultimately accepted. He contrasts 'the complete unanimity with which the American public had accepted the principle of compulsory jurisdiction with regard to legal disputes' in 1946 with the widespread opposition to the same proposal in 1936. Like Charles Cheney Hyde and Pitman B. Potter, each of whom contributes an editorial comment on various aspects of the United States acceptance of jurisdiction and reservations, Mr. Wilcox thinks that national and international public opinion will obviate any real abuse by the United States Government of the reservation of matters of domestic jurisdiction 'as determined by the United States'. Lawrence Preuss in a carefully analytical article on 'The International Court of Justice, the Senate and Matters of Domestic Jurisdiction' is rather more critical of this 'retrograde step'. A note by Joseph L. Kunz deals with the legal position of the Secretary-General.

Brief mention must be made of some of the other interesting matters dealt with. Edwin Borchard justifies the President's Proclamation relating to national exploitation of the resources of

the Continental Shelf and consequent jurisdiction over the submarine soil beyond the marginal sea belt, and there is a Current Note on the same subject by Joseph Walter Bingham. Archibald King brings up to date an article published by him in 1942 on 'Jurisdiction over Friendly Foreign Armed Forces'. This second article criticises British and Canadian practice for not conceding to other allied troops the full immunity from jurisdiction conceded to United States troops.

Two articles by Soviet writers, while not perhaps of particular legal value, throw some light on the modern Soviet approach to international law. But probably not everybody will agree with Professor E. A. Korovin's conclusion that 'the task of the Soviet science of international law is to prove equal to Soviet international practice'. English readers will find two editorial comments by Joseph L. Kunz of special interest: one on the Guatemalan claim against Britain in the matter of British Honduras, and a plea for more study of international law in American law schools, which echoes the similar plea for England made by Sir Arnold McNair before the Grotius Society in 1944.

The volume contains the valuable familiar features: the Chronicle of International Events, which includes a list of ratifications and accessions to international conventions; comprehensive book reviews, and a Supplement of Documents. The present Supplement includes the documents relating to the armistice with Italy; the constitutions of several international organisations; and the Draft Declaration of the International Rights and Duties of Man and Accompanying Report of the Inter-American Juridical Committee. There is also a useful collection of judicial decisions. These include *R.* v. *Joyce*, *United States of Mexico* v. *Schmuck*, and *Reisig and Popple* v. *Associated Jewish Charities of Baltimore and the Hebrew University of Jerusalem*. Most interesting perhaps is the decision of the majority of the Supreme Court, *Re Yamashita* (Murphy and Rutledge, JJ., dissenting), that military tribunals established by belligerents for the trial of members of the enemy's forces for violations of the laws of war are not bound by constitutional requirements for due process in the domestic sense.

An index is provided. This is adequate for names, but if a word of criticism may be ventured, would be more valuable if it dealt more exhaustively with subjects.

C. JOHN COLOMBOS.

International Organisation, Vol. 1, No. 1, February, 1947. [World Peace Foundation. x and 278 pp. $1.25 quarterly, subscription $3.50 a year. (Agents for Great Britain, Allen & Unwin, Ltd.)]

ALL who are concerned with international law and international affairs will welcome the appearance of this new periodical, which is

to be published four times annually. The first issue fully justifies the claim by the President of the World Peace Foundation, who contributes a foreword, that this new periodical ' should perform a unique service to teachers, students and specialists in the field of international organisation '.

Apart from three articles—in one of which Professor Leland M. Goodrich, the Chairman of the Board of Editors, compares the Charter of the United Nations with the Covenant of the League of Nations—the bulk of this journal is devoted to an excellent and fully documented summary of the activities of international organisations during 1946. Although the editors of this section do not claim to have covered all international organisations, they have certainly succeeded in providing in a comparatively small compass readable and practical digests of the vast documentation covering the activities of all the most important official international bodies. These are classified as follows: The United Nations, the Specialised Agencies, other International Organisations, Regional International Organisations, and War and Transitional Organisations. A useful selection of United Nations and other documents and a valuable twenty-page bibliography complete the contents. A full index supplement is promised with the November issue.

L. B. S.

The Double Taxation Conventions. By F. E. Koch. Vol. 1: Taxation of Income. [London: Stevens & Sons, Ltd. £2 5s.]

This book deals only with the double taxation of income. A further volume will be devoted to the Conventions concerned with Estate Duty. In the present work the Conventions between Great Britain and the United States, Canada, Southern Rhodesia, South Africa, Australia and France are examined and fully annotated. The helpful method which has been adopted is to treat the Convention with the United States as the model, thus reducing comment on the remaining Conventions to those elements in which they are at variance with the U.S. Convention. Though duplication is spared in this way, the differences in the prevailing tax systems in the various countries necessitated a considerable variety of treatment in the Conventions and hence comment and annotation in the work under review.

International double taxation arises where different sovereign countries exercise their power to subject the same person to taxes of a substantially similar character on the same object. It arises most frequently where personal and impersonal tax liability co-exist (personal liability being based on personal status—nationality, domicile, residence; impersonal liability arising when a State claims tax on income earned or received within its territory without having regard to the personal status of the recipient). A

person may be subject to tax on the same income in one country on account of his personal status and in another because the source of his income is situated within its territory. A second class of double taxation includes cases of simultaneous personal liability of a person in various countries, one country claiming tax, for example, on account of nationality (as in the U.S.), another because the person taxed is resident there (as in the U.K.). A third class arises when different countries apply different tests of impersonal tax liability, thus, business transactions may be subject to tax both in the country of their origin and of their completion.

An attempt to overcome these undesirable results by a system devised on a multilateral basis would encounter almost insuperable difficulties. As the author points out,[1] 'Each country will define the conditions which involve liability to tax in a different way, and it will be extremely difficult, if not impossible, to find a definition which is uniformly understood and applied by all countries concerned. The national law will often define the liability to tax by reference to technical or legal terms such as residence, domicile, permanent establishment, control and management, sale, lease, or succession after death. The meanings of these terms and the legal conceptions to which the law refers will differ in different countries. . . . The difficulties begin when we examine the first characteristic of double tax, *i.e.*, "the same subject". It is obviously simple enough to answer the question of the subject of a certain tax when the same natural person is charged in several countries. Problems arise when we are dealing with a body of persons, an association, a partnership or a corporation. Here we are confronted with the problem of legal qualification. The subject of tax on income imposed on a body of persons may be the members of the body in one country and the body as a separate legal entity in another country.[2] . . . It will often be equally difficult to ascertain the identity of the object of the tax, *i.e.*, of the facts upon which the law bases its claim to tax. . . .'

The problem is simpler when approached on a bilateral basis, as in the conventions the subject of the present book. The difficulties are still there, however, particularly of course in the details of the application of the general principles of the conventions, and the test of the present work from the point of view of the legal practitioner and others professionally concerned, must lie in the author's ability to analyse clearly the difficulties of detail and give indications that will help to their solution. Let it be said at once that the book answers the test very well.

The United Kingdom–United States Convention defines, in articles 1 and 2, certain fundamental terms of its provisions in order

[1] Pp. 5–7.

[2] Swiss law recognises corporations, partnerships and limited partnerships as legal entities, and German and English law do not so recognise partnerships. See, *e.g.*, *Dreyfus* v. *Commissioners of Inland Revenue* (1929), 14 Tax Cas. 560.

to secure their uniform interpretation by the courts of both countries concerned. It thereby creates international law. These rules are, however, also subject to construction by the national courts when they are called upon to deal with double taxation relief claims of individual taxpayers, so that either of two national laws may also be involved. The author devotes Chapter 5 of his book to an outline of the British and United States rules of construction. Here, to a limited extent, we are confronted with the problem of the admissibility or otherwise of the ' travaux préparatoires ' in assisting construction. The English cases are clear that ' in a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. . . . Nothing is to be read in, nothing is to be implied '.[3] The American courts are guided by two rules: (a) the statute should be interpreted in accordance with its usual meaning rather than in a strained or technical sense; (b) a construction leading to an absurd or confusing result is improper, though, in interpreting statutes they have not ' strictly refused to contemplate ' the ' history of the legislation '.[4] A special rule of interpretation applicable only to Tax Acts is based on the orthodox conception that taxes are intrusions on private property by the Government. Tax Acts have, therefore, to be construed in favour of the taxpayer. There is, however, a new and increasing tendency to outlaw tax avoidance.

Agencies and subsidiary companies also require, and receive, careful consideration in connection with the question of permanent establishments. As the author points out, the fundamental issue in the former case is whether trading through agents amounts to trade *within* (in contrast to mere trading *with*) the foreign country, and the reader is referred to a full treatment of this issue at a later point in the book. ' From the point of view of the tax law the subsidiary company is of special interest because it offers the possibility of shifting profits from the parent company to the subsidiary company or vice versa, or to another subsidiary company by special secret or open arrangements between the members of the concern so as to avoid tax in one country which from the taxpayer's point of view is less favourable than in another one '. While the Convention ' precludes disregarding the separate legal existence of the subsidiary in order to reach through it the parent . . . article 4 provides a safeguard against abuses resulting in the diversion of profits and losses from one company to the other in order to escape taxes which would be due if the commercial and financial relations between the two companies would be such as would exist between two independent enterprises '.

If the book is slightly marred by such linguistic errors as the repeated use of the conditional verb after ' if ', as instanced in the

[3] Sir Sidney Rowlatt in *Cape Brandy Syndicate* v. *C. I. R.*, [1921] 2 K.B. 403.
[4] *Bankers' Trust Co.* v. *Bowers*, 295 Fed. 89, 1923.

passage just quoted, and other occasional un-English forms, it attains in general the high standard of clarity which the extreme technicality of the subject demands, and enough examples have been given to demonstrate the thorough research which the author has devoted to his task. The subject is of immense importance and the author has done it justice. The publishers draw attention to their intention to issue supplements to this work from time to time and this is welcome news.[5]

E. H. WALL.

Les Sources du Droit International. By MAX SØRENSEN. [Copenhagen: Einar Munksgaard. 1946. pp. 274.]

FEW, if any, words in legal terminology have ever been used with less consistency than the term 'sources'. It may be useful, therefore, to indicate briefly the specific meaning of the word in the context of Mr. Sørensen's work. He is not concerned with the political, social and ideological factors that determine the contents and objectives of legal rules. Nor is he directly concerned with the doctrinal controversy (dearer to the hearts of continental scholars than of their Anglo-Saxon colleagues) about the basic validity of legal order. However, the author's position in relation to this problem of 'the source' (in the singular) is clear enough. With Alf. Ross he holds that the human mind has no direct conception of 'validity'; it works simply with 'rationalised expressions of certain experiences of validity'. Accordingly, the 'validity of the law' is nothing but a psychological phenomenon: the rationalisation of certain impulses which, on the strength of tradition and of the given state of social organisation, impose themselves with particular force upon the human mind.

Such, then, is Mr. Sørensen's point of departure for an inquiry into the sources of international law; and the point of departure strictly determines the scope of the inquiry. It does not embrace all the 'agencies' (if one may borrow Professor Allen's word) by which rules of conduct acquire the character of law; Mr. Sørensen's research concentrates on such general elements as can be detected in the particularly forceful psychological impulses which determine the contents of our concrete conceptions of law in general and international law in particular. To Mr. Sørensen, these psychological impulses reveal themselves most completely in the mental processes of the judge trying to arrive at a decision. That, in itself, is not a new proposition; and yet, not a few sociologists and psychologists are likely to take issue with its application to international law in

[5] A summary of an address by Sir Cornelius Gregg, President of the Board of Inland Revenue on 'Double Taxation Relief', appeared in *International Law Quarterly*, Vol. 1, pp. 44–7.

particular. This branch of the law is 'judge-made' to an even smaller extent than others; is it not legitimate, then, to submit that the 'psychological impulses' of judges may have had (and may continue to have) a lesser bearing on its development than those of statesmen and diplomats? These doubts are further accentuated by the fact that Mr. Sørensen confined his research to the judgments and opinions of one single Bench: the Permanent Court at the Hague. One cannot help feeling that the extension of his inquiry into the rich field of international arbitration (spread, as it was, over a much longer period and a wider range of conflicts) might well have yielded highly interesting material and—possibly—somewhat different conclusions.

But even though Mr. Sørensen's book only covers a limited field (with the inevitable result that his conclusions must not be taken to admit of general application), his findings are valuable and instructive. They centre round the question whether or not Article 38 of the Statute of the Court has proved to be a valid statement of the hierarchy of the sources of international law ('hierarchy' meaning, in this context, the order of priority in which the international judge does *in effect* look to treaties, custom, general principles, precedents, doctrines and equity in the process of selecting a suitable basis for his judgment). In other words, Mr. Sørensen set out to prove or disprove what Lord Phillimore believed to be true from the outset: *i.e.*, that Article 38 was the best (if not the perfect) statement of the hierarchy. With admirable patience and skill the author of this book has scanned every judgment and advisory opinion of the court for proof or refutation. The final result can be briefly summarised: Mr. Sørensen assures us that, subject to two qualifications, the order of priority established in Article 38 is fully confirmed by the practice of the court. What are the qualifications? First, the judges have been led more frequently and more cogently by precedents than the modest place reserved for these in Article 38 seemed to predict; and secondly, equity has proved to be a definite source of international law and not simply a procedural stopgap to which role it seemed to be relegated by the Statute.

Having established as much, Mr. Sørensen goes one long step further and looks for an answer to the question: why is it that the judicial mind gives priority to certain sources in preference to others? He is not content with the traditional explanation, *i.e.*, that precedence is by now firmly established by judicial tradition or that no judge can escape the spell cast upon him by the order in which the different sources are referred to in the text of Article 38. Mr. Sørensen is inclined—as were others before him—to believe that the lex specialis has a stronger impact on the judicial mind than the lex generalis; and further, that for obvious psychological reasons the judge will give preference to the source which is the easiest to prove. Treaties are, as a rule, more specific than

custom; again, customary rules are more specific than most of the general principles of law. That in itself is sufficient to establish an order of preference; and the preference is further strengthened by the greater ease with which the existence and authentic interpretation of a conventional rule can be established than the existence and meaning of custom or general principle.

These explanations are certainly reasonable and, to some extent, cogent; but they can hardly be taken to provide the master key to the secrets of judicial reasoning and—with commendable sincerity—Mr. Sørensen refrains from claiming that they do. All the same, it would be misleading to assess the value of this book purely on the strength of its conclusions. What is of lasting value in Mr. Sørensen's work is the fresh and workmanlike analysis of the material. He has been eminently successful in proving (by quoting chapter and verse) that judicial reasoning is considerably less 'automatic' even in the field of international law than it is commonly supposed to be. For the future of international law, few problems are more vital than the role to be assigned to judicial discretion in finding a just equilibrium between contending social and economic forces. On the manifestations of that discretion during a crucial period in the development of the law of nations Mr. Sørensen has turned a revealing and penetrating searchlight.

ANDREW MARTIN.

Nouvelle Revue de Droit International Privé. 1946. 13e Année. Tome xiii. Nos. 1–2. [Paris: Les Éditions Internationales. 338 pp. Annual subscription: France, 1,000 francs; Abroad, 1,200 francs.]

FACTORS with which we are not unfamiliar in this country delayed the publication until the spring of 1947 of the present number of this *Review*. The loss, in terms of topicality, is, however, not great.

Besides two articles of general interest on the Future of International Law and the United Nations and Peace, there are others of more specialist interest. Three of those are devoted to the position of the individual under various legal systems as is revealed by the following titles: the Status of Refugees from Germany under the Geneva Convention; Two Nationality Codes (U.S.A. 1940, France 1945); The English Law of 1943 concerning the Nationality and Status of Aliens.

An article that should be of great interest to readers in this country deals with the French law regulating foreign held assets in France and French held assets abroad, a subject which can profitably be given the further elaboration promised it in the next number of the *Review*. An aspect of French internal fiscal law is examined in an article dealing with the position of war victims in

relation to the national solidarity tax. The legal consequences of the return of Austria to national independence are also examined.

Cases involving an element of international law that have come before the courts in France, Great Britain and Switzerland are well reviewed, and such regrets as one may have at the time that has been allowed to elapse between the decision in these cases and the present reports are mitigated by the excellence of the reporting and the confidence that the review will make up the lost time in future numbers.

A book review section and a documents section have their share in making these 338 pages of material a double number of solid value.

J.

A Manual of International Law. Second Edition. By S. Jackson, B.A., LL.B. [London: Sweet & Maxwell. 1947. 106 pp. 6s.]

The first edition of this useful little compendium was published thirteen years ago, and the present volume contains much new material, such as notes and comments on events since that time and short summaries of important cases and arbitrations decided since 1933. The section on the League of Nations has been preserved 'because, apart from its historical interest, it may be a useful guide to the student in examining the new machinery set up by the United Nations'.

The book is divided into three parts: The Law of Peace, the Laws of War, Neutrality, and in an attempt to stress the legal aspect of International Law, the author has insisted more particularly on the practice of States as manifested by judicial decisions, arbitral awards and conventions.

To compress such a subject as International Law, ranging as it does over such a vast and varied field, into a little more than 100 pages, is a remarkable achievement. As an introductory survey—which is what this work is intended to be—it may be warmly commended.

E. H. W.

PROVIDED the analogy is not applied too rigorously, a comparison may well be drawn between the structure of the United Nations and its specialised agencies, and that of a Government and its departments. This could be demonstrated by setting out together the constitutions of all the specialised agencies, but space does not permit that to be done here. Moreover, it would be premature to do so because several of the specialised agencies are still in the process of being established. However, the development of agencies for economic purposes is illustrated by the extract printed in the present issue from the Proposals for Consideration by an International Conference on Trade and Employment made by the United States to the United Kingdom in December, 1945.

The Constitution of the Food and Agriculture Organisation has already been printed in the first issue of the *Quarterly*, and in the present issue we are printing the text of the Constitution of the World Health Organisation. This Constitution has been worked out in considerable detail, and there are certain features which will be of interest to international lawyers. Of particular interest are the provisions for the associate membership of non-self-governing territories, the powers of the Health Assembly to adopt regulations which shall become binding on members unless they give notice to the contrary within a given period and the procedure for amendment of the Constitution.

One of the old and well established organisations to become a specialised agency is the International Labour Organisation. Amendments to its Constitution adopted in the light of its new position are included in extracts printed from the Instrument for the Amendment of the Constitution of the International Labour Organisation of November 5, 1945.

Following the restrictions made necessary by the second World War there is a movement to facilitate freedom of travel between various States. This movement has found concrete expression in the exchange of Notes between the Government of the United Kingdom and the Government of France concerning the mutual abolition of visas. Similar agreements have also been made between the United Kingdom and Belgium, Luxembourg, Norway, Denmark, Sweden and the Netherlands. The problem of travel is particularly acute in the case of refugees, and to help to solve this

problem an Agreement Relating to the Issue of a Travel Document to Refugees has been made as the result of a conference held on the invitation of the International Governmental Committee on Refugees. The first twenty articles of this Agreement are printed in the present issue of the *Quarterly*.

A problem of major importance in the post-war world is civil aviation. The United Kingdom has made bilateral agreements with a number of countries relating to air services between their respective territories. The general provisions of these agreements are similar though not identical. In each case the detailed arrangements concerning the air services are set out in an annex to the agreement. There is of course very considerable difference between the provisions in the various annexes, but as an instance of the general provisions of the agreements relating to air services, the one between the United Kingdom and the United States is included here. With regard to similar conventions concluded by the United States with various other countries, the Air Transport Agreement with Syria, printed amongst the documents in this issue, is intended to serve as an example.

There is also included a substantial part of the Treaty of Alliance between the United Kingdom and Trans-Jordan which contains a formal recognition of the emergence of Trans-Jordan as a fully independent State.

1

PROPOSALS FOR CONSIDERATION BY AN INTERNATIONAL CONFERENCE ON TRADE AND EMPLOYMENT AS TRANSMITTED BY THE SECRETARY OF STATE OF THE UNITED STATES OF AMERICA TO HIS MAJESTY'S AMBASSADOR AT WASHINGTON.[1]

Washington, December 6, 1945

PROPOSALS FOR CONSIDERATION BY AN INTERNATIONAL CONFERENCE ON TRADE AND EMPLOYMENT.

A. Need for International Economic Co-operation

1. Collective measures to safeguard the peoples of the world against threats to peace and to reach just settlements of disputes among nations must be based not only on international machinery to deal directly with disputes and to prevent aggression, but also on economic co-operation among nations with the object of preventing

[1] For full text see [Cmd.] 6709.

and removing economic and social maladjustments, of achieving fairness and equity in economic relations between states, and of raising the level of economic well-being among all peoples.

2. Important contributions have already been made toward the attainment of these objectives. The Food and Agriculture Organisation of the United Nations has been established. An International Monetary Fund to maintain reasonable exchange stability and facilitate adjustment in the balance of payments of member countries, and an International Bank for Reconstruction and Development to provide financial resources on a co-operative basis for those purposes are awaiting the action of governments required for their establishment.

3. In order to reach the objectives of the Atlantic Charter and Article VII of the mutual-aid agreements, it is essential that the co-operative economic measures already taken or recommended be supplemented by further measures dealing directly with trade barriers and discriminations which stand in the way of an expansion of multilateral trade and by an undertaking on the part of nations to seek full employment.

4. Co-operative action with respect to trade and employment is indispensable to the success of such other measures as those dealing with monetary and exchange stability and the flow of investment capital. Effective action in regard to employment and to trade barriers and discriminations must, therefore, be taken or the whole programme of international economic co-operation will fail, and an economic environment conducive to the maintenance of peaceful international relations will not be created.

B. Proposals Concerning Employment

Since high and stable levels of employment are a necessary condition for an enlarged volume of trade, and since problems of trade and employment are to be considered jointly at an international conference, the following propositions are advanced.

Governing Principles

1. It is recognised that:

(a) In all countries high and stable employment is a main condition for the attainment of satisfactory levels of living.

(b) The attainment of approximately full employment by the major industrial and trading nations, and its maintenance on a reasonably assured basis, are essential to the expansion of international trade on which the full prosperity of these and other nations depends; to the full realisation of the objectives of all liberal international agreements in such fields as commercial policy, commodity problems, restrictive business practices, monetary stabilisation, and investment; and, therefore, to the preservation of world peace and security.

2. Domestic programmes to expand employment should be consistent with realisation of the purposes of liberal international agreements and compatible with the economic well-being of other nations.

3. It is recognised that the adoption of the Bretton Woods Agreements and of measures to reduce restrictions on trade will contribute substantially to the maintenance of productive employment.

4. The United Nations have pledged, in the Charter of the United Nations Organisation, to take joint and separate action in co-operation with the Organisation to achieve the economic and social purposes of the United Nations, including higher standards of living, full employment, and conditions of economic and social progress and development.

Effectuation of Aims

There should be an undertaking that:

1. Each of the signatory nations will take action designed to achieve and maintain full employment within its own jurisdiction, through measures appropriate to its political and economic institutions.
2. No nation will seek to maintain employment through measures which are likely to create unemployment in other countries or which are incompatible with international undertakings designed to promote an expanding volume of international trade and investment in accordance with comparative efficiencies of production.
3. Signatory nations will make arrangements, both individually and collaboratively under the general sponsorship of the Economic and Social Council of the United Nations Organisation, for the collection, analysis and exchange of information on employment problems, trends, and policies.
4. Signatory nations will, under the general sponsorship of the Economic and Social Council, consult regularly on employment problems and hold special conferences in case of threat of widespread unemployment.

C. Proposals Concerning an International Trade Organisation

Need for an International Trade Organisation

1. Measures designed to effect an expansion of trade are essential because of their direct contribution to maximum levels of employment, production and consumption. Since such expansion can only be attained by collective measures, in continuous operation and adaptable to economic changes, it is necessary to establish permanent machinery for international collaboration in matters

affecting international commerce, with a view to continuous consultation, the provision of expert advice, the formulation of agreed policies, procedures and plans, and to the development of agreed rules of conduct in regard to matters affecting international trade.

2. It is accordingly proposed that there be created an International Trade Organisation of the United Nations, the members of which would undertake to conduct their international commercial policies and relations in accordance with agreed principles to be set forth in the articles of the Organisation. These principles, in order to make possible an effective expansion of world production, employment, exchange and consumption, should:

(a) Provide an equitable basis for dealing with the problems of governmental measures affecting international trade;

(b) Provide for the curbing of restrictive trade practices resulting from private international business arrangements; and

(c) Govern the institution and operation of inter-governmental commodity arrangements.

Proposed International Trade Organisation

There follows an outline of the principles which it is proposed should be incorporated in the articles of the Organisation.

2

CONSTITUTION OF THE WORLD HEALTH ORGANISATION

SIGNED IN NEW YORK ON JULY 22, 1946

THE STATES parties to this Constitution declare, in conformity with the Charter of the United Nations, that the following principles are basic to the happiness, harmonious relations and security of all peoples:

Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.

The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States.

The achievement of any State in the promotion and protection of health is of value to all.

Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger.

Healthy development of the child is of basic importance; the ability to live harmoniously in a changing total environment is essential to such development.

The extension to all peoples of the benefits of medical, psychological and related knowledge is essential to the fullest attainment of health.

Informed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people.

Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures.

ACCEPTING THESE PRINCIPLES, and for the purpose of co-operation among themselves and with others to promote and protect the health of all peoples, the contracting parties agree to the present Constitution and hereby establish the World Health Organisation as a specialised agency within the terms of Article 57 of the Charter of the United Nations.

CHAPTER I

OBJECTIVE

Article 1

The objective of the World Health Organisation (hereinafter called the Organisation) shall be the attainment by all peoples of the highest possible level of health.

CHAPTER II

FUNCTIONS

Article 2

In order to achieve its objective, the functions of the Organisation shall be:

(a) to act as the directing and co-ordinating authority on international health work;

(b) to establish and maintain effective collaboration with the United Nations, specialised agencies, governmental health administrations, professional groups and such other organisations as may be deemed appropriate;

(c) to assist governments, upon request, in strengthening health services;

(d) to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of governments;

(e) to provide or assist in providing, upon the request of the United Nations, health services and facilities to special groups, such as the peoples of trust territories;
(f) to establish and maintain such administrative and technical services as may be required, including epidemiological and statistical services;
(g) to stimulate and advance work to eradicate epidemic, endemic and other diseases;
(h) to promote, in co-operation with other specialised agencies where necessary, the prevention of accidental injuries;
(i) to promote, in co-operation with other specialised agencies where necessary, the improvement of nutrition, housing, sanitation, recreation, economic or working conditions and other aspects of environmental hygiene;
(j) to promote co-operation among scientific and professional groups which contribute to the advancement of health;
(k) to propose conventions, agreements and regulations, and make recommendations with respect to international health matters and to perform such duties as may be assigned thereby to the Organisation and are consistent with its objective;
(l) to promote maternal and child health and welfare and to foster the ability to live harmoniously in a changing total environment;
(m) to foster activities in the field of mental health, especially those affecting the harmony of human relations;
(n) to promote and conduct research in the field of health;
(o) to promote improved standards of teaching and training in the health, medical and related professions;
(p) to study and report on, in co-operation with other specialised agencies where necessary, administrative and social techniques affecting public health and medical care from preventive and curative points of view, including hospital services and social security;
(q) to provide information, counsel and assistance in the field of health;
(r) to assist in developing an informed public opinion among all peoples on matters of health;
(s) to establish and revise as necessary international nomenclatures of diseases, of causes of death and of public health practices;
(t) to standardise diagnostic procedures as necessary;
(u) to develop, establish and promote international standards with respect to food, biological, pharmaceutical and similar products;
(v) generally to take all necessary action to attain the objective of the Organisation.

Chapter III

MEMBERSHIP AND ASSOCIATE MEMBERSHIP

Article 3

Membership in the Organisation shall be open to all States.

Article 4

Members of the United Nations may become members of the Organisation by signing or otherwise accepting this Constitution in accordance with the provisions of Chapter XIX and in accordance with their constitutional processes.

Article 5

The States whose governments have been invited to send observers to the International Health Conference held in New York, 1946, may become members by signing or otherwise accepting this Constitution in accordance with the provisions of Chapter XIX and in accordance with their constitutional processes provided that such signature or acceptance shall be completed before the first session of the Health Assembly.

Article 6

Subject to the conditions of any agreement between the United Nations and the Organisation, approved pursuant to Chapter XVI, States which do not become Members in accordance with Articles 4 and 5 may apply to become Members and shall be admitted as Members when their application has been approved by a simple majority vote of the Health Assembly.

Article 7

If a Member fails to meet its financial obligations to the Organisation or in other exceptional circumstances the Health Assembly may, on such conditions as it thinks proper, suspend the voting privileges and services to which a Member is entitled. The Health Assembly shall have the authority to restore such voting privileges and services.

Article 8

Territories or groups of territories which are not responsible for the conduct of their international relations may be admitted as Associate Members by the Health Assembly upon application made on behalf of such territory or group of territories by the Member or other authority having responsibility for their international relations. Representatives of Associate Members to the Health Assembly should be qualified by their technical competence in the field of health and should be chosen from the native population. The nature and extent of the rights and obligations of Associate Members shall be determined by the Health Assembly.

CHAPTER IV

ORGANS

Article 9

The work of the Organisation shall be carried out by:

(a) The World Health Assembly (herein called the Health Assembly);

(b) the Executive Board (hereinafter called the Board);

(c) the Secretariat.

CHAPTER V

THE WORLD HEALTH ASSEMBLY

Article 10

The Health Assembly shall be composed of delegates representing Members.

Article 11

Each Member shall be represented by not more than three delegates, one of whom shall be designated by the Member as chief delegate. These delegates should be chosen from among persons most qualified by their technical competence in the field of health, preferably representing the national health administration of the Member.

Article 12

Alternates and advisers may accompany delegates.

Article 13

The Health Assembly shall meet in regular annual session and in such special sessions as may be necessary. Special sessions shall be convened at the request of the Board or of a majority of the Members.

Article 14

The Health Assembly, at each annual session, shall select the country or region in which the next annual session shall be held, the Board subsequently fixing the place. The Board shall determine the place where a special session shall be held.

Article 15

The Board, after consultation with the Secretary-General of the United Nations, shall determine the date of each annual and special session.

Article 16

The Health Assembly shall elect its President and other officers at the beginning of each annual session. They shall hold office until their successors are elected.

Article 17

The Health Assembly shall adopt its own rules of procedure.

Article 18

The functions of the Health Assembly shall be:

(a) to determine the policies of the Organisation;

(b) to name the Members entitled to designate a person to serve on the Board;

(c) to appoint the Director-General;

(d) to review and approve reports and activities of the Board and of the Director-General and to instruct the Board in regard to matters upon which action, study, investigation or report may be considered desirable;

(e) to establish such committees as may be considered necessary for the work of the Organisation;

(f) to supervise the financial policies of the Organisation and to review and approve the budget;

(g) to instruct the Board and the Director-General to bring to the attention of Members and of international organisations, governmental or non-governmental, any matter with regard to health which the Health Assembly may consider appropriate;

(h) to invite any organisation, international or national, governmental or non-governmental, which has responsibilities related to those of the Organisation, to appoint representatives to participate, without right of vote, in its meetings or in those of the committees and conferences convened under its authority, on conditions prescribed by the Health Assembly; but in the case of national organisations, invitations shall be issued only with the consent of the government concerned;

(i) to consider recommendations bearing on health made by the General Assembly, the Economic and Social Council, the Security Council or Trusteeship Council of the United Nations, and to report to them on the steps taken by the Organisation to give effect to such recommendations;

(j) to report to the Economic and Social Council in accordance with any agreement between the Organisation and the United Nations;

(k) to promote and conduct research in the field of health by the personnel of the Organisation, by the establishment of its own institutions or by co-operation with official or non-official institutions of any Member with the consent of its government;

(l) to establish such other institutions as it may consider desirable;

(m) to take any other appropriate action to further the objective of the Organisation.

Article 19

The Health Assembly shall have authority to adopt conventions or agreements with respect to any matter within the competence of the Organisation. A two-thirds vote of the Health Assembly shall be required for the adoption of such conventions or agreements which shall come into force for each Member when accepted by it in accordance with its constitutional processes.

Article 20

Each Member undertakes that it will, within eighteen months after the adoption by the Health Assembly of a convention or agreement, take action relative to the acceptance of such convention or agreement. Each Member shall notify the Director-General of the action taken and if it does not accept such convention or agreement within the time limit, it will furnish a statement of the reasons for non-acceptance. In case of acceptance, each Member agrees to make an annual report to the Director-General in accordance with Chapter XIV.

Article 21

The Health Assembly shall have authority to adopt regulations concerning:

(a) sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease;
(b) nomenclatures with respect to diseases, causes of death and public health practices;
(c) standards with respect to diagnostic procedures for international use;
(d) standards with respect to the safety, purity and potency of biological, pharmaceutical and similar products moving in international commerce;
(e) advertising and labelling of biological, pharmaceutical and similar products moving in international commerce.

Article 22

Regulations adopted pursuant to Article 21 shall come into force for all Members after due notice has been given of their adoption by the Health Assembly except for such Members as may notify the Director-General of rejection or reservations within the period stated in the notice.

Article 23

The Health Assembly shall have authority to make recommendations to Members with respect to any matter within the competence of the Organisation.

Chapter VI

THE EXECUTIVE BOARD

Article 24

The Board shall consist of eighteen persons designated by as many Members. The Health Assembly, taking into account an equitable geographical distribution, shall elect the Members entitled to designate a person to serve on the Board. Each of these Members should appoint to the Board a person technically qualified in the field of health, who may be accompanied by alternates and advisers.

Article 25

These Members shall be elected for three years and may be re-elected; provided that of the Members elected at the first session of the Health Assembly, the terms of six Members shall be for one year and the terms of six Members shall be for two years, as determined by lot.

Article 26

The Board shall meet at least twice a year and shall determine the place of each meeting.

Article 27

The Board shall elect its Chairman from among its members and shall adopt its own rules of procedure.

Article 28

The functions of the Board shall be:

(a) to give effect to the decisions and policies of the Health Assembly;
(b) to act as the executive organ of the Health Assembly;
(c) to perform any other functions entrusted to it by the Health Assembly;
(d) to advise the Health Assembly on questions referred to it by that body and on matters assigned to the Organisation by conventions, agreements and regulations;
(e) to submit advice or proposals to the Health Assembly on its own initiative;
(f) to prepare the agenda of meetings of the Health Assembly;
(g) to submit to the Health Assembly for consideration and approval a general programme of work covering a specific period;
(h) to study all questions within its competence;
(i) to take emergency measures within the functions and financial resources of the Organisation to deal with events requiring immediate action. In particular it may authorise the Director-General to take the necessary steps to combat epidemics, to participate in the organisation of

health relief to victims of a calamity and to undertake studies and research the urgency of which has been drawn to the attention of the Board by any Member or by the Director-General.

Article 29

The Board shall exercise on behalf of the whole Health Assembly the powers delegated to it by that body.

CHAPTER VII

THE SECRETARIAT

Article 30

The Secretariat shall comprise the Director-General and such technical and administrative staff as the Organisation may require.

Article 31

The Director-General shall be appointed by the Health Assembly on the nomination of the Board on such terms as the Health Assembly may determine. The Director-General, subject to the authority of the Board, shall be the chief technical and administrative officer of the Organisation.

Article 32

The Director-General shall be *ex officio* Secretary of the Health Assembly, of the Board, of all commissions and committees of the Organisation and of conferences convened by it. He may delegate these functions.

Article 33

The Director-General or his representative may establish a procedure by agreement with Members, permitting him, for the purpose of discharging his duties, to have direct access to their various departments, especially to their health administrations and to national health organisations, governmental or non-governmental. He may also establish direct relations with international organisations whose activities come within the competence of the Organisation. He shall keep Regional Offices informed on all matters involving their respective areas.

Article 34

The Director-General shall prepare and submit annually to the Board the financial statements and budget estimates of the Organisation.

Article 35

The Director-General shall appoint the staff of the Secretariat in accordance with staff regulations established by the Health

Assembly. The paramount consideration in the employment of the staff shall be to assure that the efficiency, integrity and internationally representative character of the Secretariat shall be maintained at the highest level. Due regard shall be paid also to the importance of recruiting the staff on as wide a geographical basis as possible.

Article 36

The conditions of service of the staff of the Organisation shall conform as far as possible with those of other United Nations organisations.

Article 37

In the performance of their duties the Director-General and the staff shall not seek or receive instructions from any government or from any authority external to the Organisation. They shall refrain from any action which might reflect on their position as international officers. Each Member of the Organisation on its part undertakes to respect the exclusively international character of the Director-General and the staff and not to seek to influence them.

Chapter VIII

COMMITTEES

Article 38

The Board shall establish such committees as the Health Assembly may direct and, on its own initiative or on the proposal of the Director-General, may establish any other committees considered desirable to serve any purpose within the competence of the Organisation.

Article 39

The Board, from time to time and in any event annually, shall review the necessity for continuing each committee.

Article 40

The Board may provide for the creation of or the participation by the Organisation in joint or mixed committees with other organisations and for the representation of the Organisation in committees established by such other organisations.

Chapter IX

CONFERENCES

Article 41

The Health Assembly or the Board may convene local, general, technical or other special conferences to consider any matter within

the competence of the Organisation and may provide for the representation at such conferences of international organisations and, with the consent of the government concerned, of national organisations, governmental or non-governmental. The manner of such representation shall be determined by the Health Assembly or the Board.

Article 42

The Board may provide for representation of the Organisation at conferences in which the Board considers that the Organisation has an interest.

CHAPTER X

HEADQUARTERS

Article 43

The location of the headquarters of the Organisation shall be determined by the Health Assembly after consultation with the United Nations.

CHAPTER XI

REGIONAL ARRANGEMENTS

Article 44

(a) The Health Assembly shall from time to time define the geographical areas in which it is desirable to establish a regional organisation.

(b) The Health Assembly may, with the consent of a majority of the Members situated within each area so defined, establish a regional organisation to meet the special needs of such area. There shall not be more than one regional organisation in each area.

Article 45

Each regional organisation shall be an integral part of the Organisation in accordance with this Constitution.

Article 46

Each regional organisation shall consist of a Regional Committee and a Regional Office.

Article 47

Regional Committees shall be composed of representatives of the Member States and Associate Members in the region concerned. Territories or groups of territories within the region, which are not responsible for the conduct of their international relations and which are not Associate Members, shall have the right to be represented and to participate in Regional Committees. The nature and extent

of the rights and obligations of these territories or groups of territories in Regional Committees shall be determined by the Health Assembly in consultation with the Member or other authority having responsibility for the international relations of these territories and with the Member States in the region.

Article 48

Regional Committees shall meet as often as necessary and shall determine the place of each meeting.

Article 49

Regional Committees shall adopt their own rules of procedure.

Article 50

The functions of the Regional Committee shall be:

(a) to formulate policies governing matters of an exclusively regional character;
(b) to supervise the activities of the Regional Office;
(c) to suggest to the Regional Office the calling of technical conferences and such additional work or investigation in health matters as in the opinion of the Regional Committee would promote the objective of the Organisation within the region;
(d) to co-operate with the respective regional committees of the United Nations and with those of other specialised agencies and with other regional international organisations having interests in common with the Organisation;
(e) to tender advice, through the Director-General, to the Organisation on international health matters which have wider than regional significance;
(f) to recommend additional regional appropriations by the governments of the respective regions if the proportion of the central budget of the Organisation allotted to that region is insufficient for the carrying out of the regional functions;
(g) such other functions as may be delegated to the Regional Committee by the Health Assembly, the Board or the Director-General.

Article 51

Subject to the general authority of the Director-General of the Organisation, the Regional Office shall be the administrative organ of the Regional Committee. It shall, in addition, carry out within the region the decisions of the Health Assembly and of the Board.

Article 52

The head of the Regional Office shall be the Regional Director appointed by the Board in agreement with the Regional Committee.

Article 53

The staff of the Regional Office shall be appointed in a manner to be determined by agreement between the Director-General and the Regional Director.

Article 54

The Pan-American sanitary organisation represented by the Pan-American Sanitary Bureau and the Pan-American Sanitary Conferences, and all other inter-governmental regional health organisations in existence prior to the date of signature of this Constitution, shall in due course be integrated with the Organisation. This integration shall be effected as soon as practicable through common action based on mutual consent of the competent authorities expressed through the organisations concerned.

CHAPTER XII

BUDGET AND EXPENSES

Article 55

The Director-General shall prepare and submit to the Board the annual budget estimates of the Organisation. The Board shall consider and submit to the Health Assembly such budget estimates, together with any recommendations the Board may deem advisable.

Article 56

Subject to any agreement between the Organisation and the United Nations, the Health Assembly shall review and approve the budget estimates and shall apportion the expenses among the Members in accordance with a scale to be fixed by the Health Assembly.

Article 57

The Health Assembly or the Board acting on behalf of the Health Assembly may accept and administer gifts and bequests made to the Organisation provided that the conditions attached to such gifts or bequests are acceptable to the Health Assembly or the Board and are consistent with the objective and policies of the Organisation.

Article 58

A special fund to be used at the discretion of the Board shall be established to meet emergencies and unforeseen contingencies.

CHAPTER XIII

VOTING

Article 59

Each Member shall have one vote in the Health Assembly.

Article 60

(a) Decisions of the Health Assembly on important questions shall be made by a two-thirds majority of the Members present and voting. These questions shall include: the adoption of conventions or agreements; the approval of agreements bringing the Organisation into relation with the United Nations and inter-governmental organisations and agencies in accordance with Articles 69, 70 and 72; amendments to this Constitution.

(b) Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the Members present and voting.

(c) Voting on analogous matters in the Board and in committees of the Organisation shall be made in accordance with paragraphs (a) and (b) of this Article.

Chapter XIV

REPORTS SUBMITTED BY STATES

Article 61

Each Member shall report annually to the Organisation on the action taken and progress achieved in improving the health of its people.

Article 62

Each Member shall report annually on the action taken with respect to recommendations made to it by the Organisation and with respect to conventions, agreements and regulations.

Article 63

Each Member shall communicate promptly to the Organisation important laws, regulations, official reports and statistics pertaining to health which have been published in the State concerned.

Article 64

Each Member shall provide statistical and epidemiological reports in a manner to be determined by the Health Assembly.

Article 65

Each Member shall transmit upon the request of the Board such additional information pertaining to health as may be practicable.

Chapter XV

LEGAL CAPACITY, PRIVILEGES AND IMMUNITIES

Article 66

The Organisation shall enjoy in the territory of each Member such legal capacity as may be necessary for the fulfilment of its objective and for the exercise of its functions.

Article 67

(a) The Organisation shall enjoy in the territory of each Member such privileges and immunities as may be necessary for the fulfilment of its objective and for the exercise of its functions.

(b) Representatives of Members, persons designated to serve on the Board and technical and administrative personnel of the Organisation shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation.

Article 68

Such legal capacity, privileges and immunities shall be defined in a separate agreement to be prepared by the Organisation in consultation with the Secretary-General of the United Nations and concluded between the Members.

CHAPTER XVI

RELATIONS WITH OTHER ORGANISATIONS

Article 69

The Organisation shall be brought into relation with the United Nations as one of the specialised agencies referred to in Article 57 of the Charter of the United Nations. The agreement or agreements bringing the Organisation into relation with the United Nations shall be subject to approval by a two-thirds vote of the Health Assembly.

Article 70

The Organisation shall establish effective relations and co-operate closely with such other inter-governmental organisations as may be desirable. Any formal agreement entered into with such organisations shall be subject to approval by a two-thirds vote of the Health Assembly.

Article 71

The Organisation may, on matters within its competence, make suitable arrangements for consultation and co-operation with non-governmental international organisations and, with the consent of the government concerned, with national organisations, governmental or non-governmental.

Article 72

Subject to the approval by a two-thirds vote of the Health Assembly, the Organisation may take over from any other international organisation or agency whose purpose and activities lie within the field of competence of the Organisation such functions,

resources and obligations as may be conferred upon the Organisation by international agreement or by mutually acceptable arrangements entered into between the competent authorities of the respective organisations.

Chapter XVII

AMENDMENTS

Article 73

Texts of proposed amendments to this Constitution shall be communicated by the Director-General to Members at least six months in advance of their consideration by the Health Assembly. Amendments shall come into force for all Members when adopted by a two-thirds vote of the Health Assembly and accepted by two-thirds of the Members in accordance with their respective constitutional processes.

Chapter XVIII

INTERPRETATION

Article 74

The Chinese, English, French, Russian and Spanish texts of this Constitution shall be regarded as equally authentic.

Article 75

Any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement.

Article 76

Upon authorisation by the General Assembly of the United Nations or upon authorisation in accordance with any agreement between the Organisation and the United Nations, the Organisation may request the International Court of Justice for an advisory opinion on any legal question arising within the competence of the Organisation.

Article 77

The Director-General may appear before the Court on behalf of the Organisation in connection with any proceedings arising out of any such request for an advisory opinion. He shall make arrangements for the presentation of the case before the Court including arrangements for the argument of different views on the question.

CHAPTER XIX

ENTRY INTO FORCE

Article 78

Subject to the provisions of Chapter III, this Constitution shall remain open to all States for signature or acceptance.

Article 79

(a) States may become parties to this Constitution by
(i) signature without reservation as to approval;
(ii) signature subject to approval followed by acceptance; or
(iii) acceptance.

(b) Acceptance shall be effected by the deposit of a formal instrument with the Secretary-General of the United Nations.

Article 80

This Constitution shall come into force when twenty-six Members of the United Nations have become parties to it in accordance with the provisions of Article 79.

Article 81

In accordance with Article 102 of the Charter of the United Nations, the Secretary-General of the United Nations will register this Constitution when it has been signed without reservation as to approval on behalf of one State or upon deposit of the first instrument of acceptance.

Article 82

The Secretary-General of the United Nations will inform States parties to this Constitution of the date when it has come into force. He will also inform them of the dates when other States have become parties to this Constitution.

IN FAITH WHEREOF the undersigned representatives having been duly authorised for that purpose, sign this Constitution.

DONE in the City of New York this twenty-second day of July 1946, in a single copy in the Chinese, English, French, Russian and Spanish languages, each text being equally authentic. The original texts shall be deposited in the archives of the United Nations. The Secretary-General of the United Nations will send certified copies to each of the Governments represented at the Conference.

Signed by Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Poland, Republic of the Philippines, Saudi

Arabia, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Union of South Africa, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Yugoslavia, Afghanistan, Albania, Austria, Bulgaria, Eire, Finland, Hungary, Iceland, Italy, Portugal, Roumania, Siam, Sweden, Switzerland, Transjordan, Yemen.

3

INSTRUMENT FOR THE AMENDMENT OF THE CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION.[2]

PARIS, NOVEMBER 5, 1945

Article 2

1. The following paragraphs shall be substituted for the present paragraph 2 of article 1 of the Constitution of the Organisation:

2. The Members of the International Labour Organisation shall be the States which were Members of the Organisation on November 1, 1945, and such other States as may become Members in pursuance of the provisions of paragraphs 3 and 4 of this article.

3. Any original Member of the United Nations and any State admitted to membership of the United Nations by a decision of the General Assembly in accordance with the provisions of the Charter may become a Member of the International Labour Organisation by communicating to the Director of the International Labour Office its formal acceptance of the obligations of the Constitution of the International Labour Organisation.

4. The General Conference of the International Labour Organisation may also admit Members to the Organisation by a vote concurred in by two-thirds of the delegates attending the Session, including two-thirds of the Government delegates present and voting. Such admission shall take effect on the communication to the Director of the International Labour Office by the Government of the new Member of its formal acceptance of the obligations of the Constitution of the Organisation.

5. No Member of the International Labour Organisation may withdraw from the Organisation without giving notice of its intention so to do to the Director of the International Labour Office. Such notice shall take effect two years after the date of its reception by the Director, subject to the Member having at that time fulfilled all financial obligations arising out of its membership. When a Member has ratified any International Labour Convention, such withdrawal shall not affect the continued validity

[2] For full text see Treaty Series No. 20 (1946).

for the period provided for in the Convention of all obligations arising thereunder or relating thereto.

6. In the event of any State having ceased to be a Member of the Organisation, its re-admission to membership shall be governed by the provisions of paragraph 3 or paragraph 4 of this article as the case may be.

Article 3

The following shall be substituted for the present text of article 13 of the Constitution of the Organisation:

1. The International Labour Organisation may make such financial and budgetary arrangements with the United Nations as may appear appropriate.

2. Pending the conclusion of such arrangements or if at any time no such arrangements are in force:

(a) Each of the Members will pay the travelling and subsistence expenses of its Delegates and their advisers and of its Representatives attending the meetings of the Conference or the Governing Body, as the case may be;

(b) All the other expenses of the International Labour Office and of the meetings of the Conference or Governing Body shall be paid by the Director of the International Labour Office out of the general funds of the International Labour Organisation;

(c) The arrangements for the approval, allocation and collection of the budget of the International Labour Organisation shall be determined by the Conference by a two-thirds majority of the votes cast by the delegates present, and shall provide for the approval of the budget and of the arrangements for the allocation of expenses among the Members of the Organisation by a committee of Government representatives.

3. The expenses of the International Labour Organisation shall be borne by the Members in accordance with the arrangements in force in virtue of paragraph 1 or paragraph 2 (c) of this article.

4. A Member of the Organisation which is in arrears in the payment of its financial contribution to the Organisation shall have no vote in the Conference, in the Governing Body, in any Committee, or in the elections of members of the Governing Body, if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Conference may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

5. The Director of the International Labour Office shall be responsible to the Governing Body for the proper expenditure of the funds of the International Labour Organisation.

Article 4

The following shall be substituted for the present text of article 36 of the Constitution of the Organisation:

Amendments to this Constitution which are adopted by the Conference by a majority of two-thirds of the votes cast by the delegates present shall take effect when ratified or accepted by two-thirds of the Members of the Organisation including five of the eight Members which are represented on the Governing Body as Members of chief industrial importance in accordance with the provisions of paragraph 3 of article 7 of this Constitution.

4

EXCHANGE OF NOTES BETWEEN HIS MAJESTY'S GOVERNMENT IN THE UNITED KINGDOM AND THE GOVERNMENT OF THE FRENCH REPUBLIC CONCERNING THE MUTUAL ABOLITION OF VISAS.

LONDON, DECEMBER 24/27, 1946

Your Excellency,

I HAVE the honour to inform your Excellency that, in order to carry into effect the understanding regarding the mutual abolition of visas which was reached between M. Bidault and myself on October 11 last, His Majesty's Government in the United Kingdom are prepared as a first step towards the eventual restoration of the freedom of travel which existed between British and French territories before the war, to conclude with the Government of the French Republic an agreement in the following terms:—

(1) French citizens shall be free to travel to the United Kingdom of Great Britain and Northern Ireland by any route without the necessity of obtaining a visa in advance provided that they are furnished with valid French passports.

(2) Holders of valid passports bearing on the cover the inscription 'British Passport' and inside the description of the holder's national status as 'British subject' shall be free to travel to metropolitan France and Algeria by any route without the necessity of obtaining a visa in advance.

(3) It is understood that the waiver of the visa requirement does not exempt French citizens and British subjects coming respectively to the United Kingdom and to metropolitan France or Algeria from the necessity of complying with the British and the French laws and regulations concerning the entry, residence (temporary or permanent) and employment or occupation of foreigners, and that travellers who are unable to satisfy the immigration authorities that

they comply with these laws and regulations are liable to be refused leave to enter or land.

(4) As regards travel to French or British colonies and overseas territories, protectorates or territories under mandate or trusteeship, it is understood that visas will continue to be required.

2. If the French Government are prepared to accept the foregoing provisions I have the honour to suggest that the present note and your Excellency's reply in similar terms should be regarded as placing on record the agreement between the two Governments, which shall take effect on January 1, 1947.

I have, etc.,

ERNEST BEVIN.

5

AGREEMENT RELATING TO THE ISSUE OF A TRAVEL DOCUMENT TO REFUGEES WHO ARE THE CONCERN OF THE INTERGOVERNMENTAL COMMITTEE ON REFUGEES.[3]

LONDON, OCTOBER 15, 1946

THE CONTRACTING GOVERNMENTS,

Having examined a Resolution adopted by the Intergovernmental Committee on Refugees at its Plenary Session on August 17, 1944, relating to the establishment of an identity and travel document for refugees who are the concern of the Intergovernmental Committee on Refugees,

Having regard to the international measures previously taken in the matter of travel documents for certain categories of refugees,

Convinced of the necessity of taking similar measures on behalf of the refugees referred to in the above-mentioned Resolution, with a view, in particular, to facilitating the movement of these refugees,

Considering that the making of arrangements for the emigration of refugees who cannot be absorbed in the countries in which they have taken refuge is an essential part of the work undertaken for the benefit of the said refugees,

Have agreed as follows:—

Article 1

1. Subject to the further provisions laid down in Articles 2 and 16, a travel document, in accordance with the provisions of Article 3, shall be issued by the Contracting Governments to refugees who are the concern of the Intergovernmental Committee,

[3] See [Cmd.] 7033 for full text.

provided that the said refugees are stateless or do not in fact enjoy the protection of any Government, that they are staying lawfully in the territory of the Contracting Government concerned, and that they are not benefiting by the provisions regarding the issue of a travel document contained in the Arrangements of July 5, 1922, May 31, 1924, May 12, 1926, June 30, 1928, July 30, 1935, or the Convention of October 28, 1933.[4]

2. The said document will be issued to refugees who apply for it for the purpose of travel outside their country of residence.

Article 2

As a transitional measure, the document referred to in Article 1 may, at the discretion of the Government concerned, be issued to refugees who, while fulfilling the other conditions laid down by the present Agreement, are not staying lawfully in the territory of the Contracting Government concerned on the date of the coming into force of the present Agreement, provided that they report themselves to the authorities within a period to be prescribed by the Government concerned and which shall not be less than three months.

Article 3

1. The travel document referred to in the present Agreement shall be similar to the attached specimen (see Annex).

2. It shall be made out in at least two languages—French, and the national language or languages of the authority which issues the document.

Article 4

Subject to the regulations obtaining in the country of issue, children may be included in the travel document of an adult refugee.

Article 5

The fees charged for issue of the travel document shall not exceed the lowest scale of charges for national passports.

Article 6

Save in special or exceptional cases, the documents shall be made valid for the largest possible number of countries.

Article 7

The document shall have a validity of either one or two years, at the discretion of the issuing authority.

Article 8

1. The renewal or extension of the validity of the document is a matter for the authority which issued it, so long as the holder

[4] Treaty Series No. 4 (1937).

resides lawfully in the territory of the said authority. The issue of a new document is, under the same conditions, a matter for the authority which issued the former document.

2. Diplomatic or consular authorities, specially authorised for the purpose, shall be empowered to extend, for a period not exceeding six months, the validity of travel documents issued by their Governments.

Article 9

Each Contracting Government shall recognise the validity of the documents issued in accordance with the provisions of the present Agreement.

Article 10

The competent authorities of the country to which the refugee desires to proceed shall, if they are prepared to admit him, affix a visa on the document of which he is the holder.

Article 11

The authorities of the territories to which the present Agreement applies undertake to issue transit visas to refugees who have obtained visas for the territory of final destination.

Article 12

The fees for the issue of exit, entry or transit visas shall not exceed the lowest scale of charges for visas on foreign passports.

Article 13

When a refugee has lawfully taken up residence in another territory to which the present Agreement applies, the power to issue a new travel document will be transferred to the competent authority of that territory, to which the refugee shall be entitled to apply.

Article 14

The authority issuing a new document shall withdraw the old document.

Article 15

1. The travel document shall entitle the holder to leave the country where it has been issued and, during the period of validity of the said document, to return thereto without a visa from the authorities of that country, subject only to those laws and regulations which apply to the bearers of duly visaed passports.

2. The Contracting Governments reserve the right, in exceptional cases, when issuing the document, to limit the period during which the refugee may return, the said period being not less than three months.

Article 16

1. Subject only to the terms of Article 15, the present provisions in no way affect the laws and regulations governing the conditions

of admission to, transit through, residence and establishment in, and departure from, the territories to which the present Agreement applies.

2. Nor do they affect the special provisions concerning persons coming under the present Agreement in the territories to which it applies.

Article 17

Neither the issue of the document nor the entries made thereon determine or affect the status of the holder, particularly as regards nationality.

Article 18

The issue of the document does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, and does not confer on these authorities a right of protection.

Article 19

Travel documents issued before the entry into force of the present Agreement to persons benefiting by the provisions of Articles 1 and 2 shall remain valid until they have expired.

Article 20

In the event of the transfer to any other international organisation of the functions of the Inter-governmental Committee on Refugees, all the provisions in the Agreement relating to the Inter-governmental Committee shall be deemed to apply to the said organisation.

6

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA RELATING TO AIR SERVICES BETWEEN THEIR RESPECTIVE TERRITORIES.[5]

BERMUDA, FEBRUARY 11, 1946

Article 1

Each Contracting Party grants to the other Contracting Party rights to the extent described in the Annex to this Agreement for the purpose of the establishment of air services described therein or as amended in accordance with Section IV of the Annex (hereinafter referred to as ' the agreed services ').

Article 2

(1) The agreed services may be inaugurated immediately or at a later date at the option of the Contracting Party to whom the

[5] See [Cmd.] 6747 for full text.

rights are granted, but not before (a) the Contracting Party to whom the rights have been granted has designated an air carrier or carriers for the specified route or routes, and (b) the Contracting Party granting the rights has given the appropriate operating permission to the air carrier or carriers concerned (which, subject to the provisions of paragraph (2) of this Article and of Article 6, it shall do without undue delay).

(2) The designated air carrier or carriers may be required to satisfy the aeronautical authorities of the Contracting Party granting the rights that it or they is or are qualified to fulfil the conditions prescribed by or under the laws and regulations normally applied by those authorities to the operations of commercial air carriers.

(3) In areas of military occupation, or in areas affected thereby, such inauguration will continue to be subject, where necessary, to the approval of the competent military authorities.

Article 3

(1) The charges which either of the Contracting Parties may impose, or permit to be imposed, on the designated air carrier or carriers of the other Contracting Party for the use of airports and other facilities shall not be higher than would be paid for the use of such airports and facilities by its national aircraft engaged in similar international air services.

(2) Fuel, lubricating oils and spare parts introduced into, or taken on board aircraft in, the territory of one Contracting Party by, or on behalf of, a designated air carrier of the other Contracting Party and intended solely for use by the aircraft of such carrier shall be accorded, with respect to customs duties, inspection fees or other charges imposed by the former Contracting Party, treatment not less favourable than that granted to national air carriers engaged in international air services or such carriers of the most favoured nation.

(3) Supplies of fuel, lubricating oils, spare parts, regular equipment and aircraft stores retained on board aircraft of a designated air carrier of one Contracting Party shall be exempt in the territory of the other Contracting Party from customs duties, inspection fees or similar duties or charges, even though such supplies be used by such aircraft on flights within that territory.

Article 4

Certificates of airworthiness, certificates of competency and licenses issued or rendered valid by one Contracting Party and still in force shall be recognised as valid by the other Contracting Party for the purpose of operation of the agreed services. Each Contracting Party reserves the right, however, to refuse to recognise for the purpose of flight above its own territory, certificates of

competency and licenses granted to its own nationals by another State.

Article 5

(1) The laws and regulations of one Contracting Party relating to entry into or departure from its territory of aircraft engaged in international air navigation or to the operation and navigation of such aircraft while within its territory shall apply to aircraft of the designated air carrier or carriers of the other Contracting Party.

(2) The laws and regulations of one Contracting Party relating to the entry into or departure from its territory of passengers, crew, or cargo of aircraft (such as regulations relating to entry, clearance, immigration, passports, customs and quarantine) shall be applicable to the passengers, crew or cargo of the aircraft of the designated air carrier or carriers of the other Contracting Party while in the territory of the first Contracting Party.

Article 7

This Agreement shall be registered with the Provisional International Civil Aviation Organisation set up by the Interim Agreement on International Civil Aviation signed at Chicago on December 7, 1944.[6]

Article 8

Except as otherwise provided in this Agreement or its Annex, if either of the Contracting Parties considers it desirable to modify the terms of the Annex to this Agreement, it may request consultatation between the aeronautical authorities of both Contracting Parties, such consultation to begin within a period of sixty days from the date of the request. When these authorities agree on modifications to the Annex, these modifications will come into effect when they have been confirmed by an Exchange of Notes through the diplomatic channel.

Article 9

Except as otherwise provided in this Agreement or in its Annex, any dispute between the Contracting Parties relating to the interpretation or application of this Agreement or its Annex which cannot be settled through consultation shall be referred for an advisory report to the Interim Council of the Provisional International Civil Aviation Organisation (in accordance with the provisions of Article III, section 6 (8), of the Interim Agreement on International Civil Aviation signed at Chicago on December 7, 1944), or its successor.

Article 11

If a general multilateral air Convention enters into force in relation to both Contracting Parties, the present Agreement shall be amended so as to conform with the provisions of such Convention.

[6] 'Miscellaneous No. 6 (1945),' [Cmd.] 6614.

7

AIR TRANSPORT AGREEMENT BETWEEN THE UNITED STATES AND SYRIA.[7]

Signed at Damascus on April 28, 1947, with Chargé d'Affaires James S. Moose, Jr., signing on behalf of the United States Government, and Prime Minister Jamil Mardam Bey signing for Syria.

Having in mind the resolution signed under date of December 7, 1944, at the International Civil Aviation Conference in Chicago, Illinois, for the adoption of a standard form of agreement for provisional air routes and services, and the desirability of mutually stimulating and promoting the sound economic development of air transportation between the United States and Syria, the two Governments parties to this arrangement agree that the establishment and development of air transport services between their respective territories shall be governed by the following provisions:

Article 1

The contracting parties grant the rights specified in the Annex hereto necessary for establishing the international civil air routes and services therein described, whether such services be inaugurated immediately or at a later date at the option of the contracting party to whom the rights are granted.

Article 2

(a) Each of the air services so described shall be placed in operation as soon as the contracting party to whom the rights have been granted by Article 1 to designate an airline or airlines for the route concerned has authorised an airline for such route, and the contracting party granting the rights shall, subject to Article 6 hereof, be bound to give the appropriate operating permission to the airline or airlines concerned; provided that the airlines so designated may be required to qualify before the competent aeronautical authorities of the contracting party granting the rights under the laws and regulations normally applied by these authorities before being permitted to engage in the operations contemplated by this agreement; and provided that in areas of hostilities or of military occupation, or in areas affected thereby, such inauguration shall be subject to the approval of the competent military authorities.

(b) It is understood that either contracting party granted commercial rights under this agreement should exercise them at the earliest practicable date except in the case of temporary inability to do so.

[7] United States Department of State, May 5, 1947, No. 384.

Article 3

In order to prevent discriminatory practices and to assure equality of treatment, both contracting parties agree that:

(a) Each of the contracting parties may impose or permit to be imposed just and reasonable charges for the use of public airports and other facilities under its control. Each of the contracting parties agrees, however, that these charges shall not be higher than would be paid for the use of such airports and facilities by its national aircraft engaged in similar international services.

(b) Fuel, lubricating oils and spare parts introduced into the territory of one contracting party by the other contracting party or its nationals, and intended solely for use by aircraft of such other contracting party shall be accorded national and most-favoured-nation treatment with respect to the imposition of customs duties, inspection fees or other national duties or charges by the contracting party whose territory is entered.

(c) The fuel, lubricating oils, spare parts, regular equipment and aircraft stores retained on board civil aircraft of the airlines of one contracting party authorised to operate the routes and services described in the Annex shall, upon arriving in or leaving the territory of the other party, be exempt from customs, inspection fees or similar duties or charges, even though such supplies be used or consumed by such aircraft on flights in that territory.

Article 4

Certificates of airworthiness, certificates of competency and licences issued or rendered valid by one contracting party shall be recognised as valid by the other contracting party for the purpose of operating the routes and services described in the Annex. Each contracting party reserves the right, however, to refuse to recognise, for the purpose of flight above its own territory, certificates of competency and licences granted to its own nationals by another State.

Article 5

(a) The laws and regulations of one contracting party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of the other contracting party, and shall be complied with by such aircraft upon entering or departing from or while within the territory of the first party.

(b) The laws and regulations of one contracting party as to the admission to or departure from its territory of passengers, crew, or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo of the other contracting party upon entrance into or departure from, or while within the territory of the first party.

Article 6

Each contracting party reserves the right to withhold or revoke a certificate or permit to an airline of the other party in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of the other party to this agreement, or in case of failure of an airline to comply with the laws of the State over which it operates as described in Article 5 hereof, or to perform its obligations under this agreement.

Article 7

This agreement and all contracts connected therewith shall be registered with the International Civil Aviation Organisation.

Article 8

Either contracting party may terminate the rights for services granted by it under this agreement by giving one year's notice to the other contracting party.

Article 9

In the event either of the contracting parties considers it desirable to modify the routes or conditions set forth in the attached Annex, it may request consultation between the competent authorities of both contracting parties, such consultation to begin within a period of sixty days from the date of the request. When these authorities mutually agree on new or revised conditions affecting the Annex, their recommendations on the matter will come into effect after they have been confirmed by an exchange of diplomatic Notes.

Article 10

Any dispute between the contracting parties relating to the interpretation or application of this Agreement or its Annex which cannot be settled through consultation shall be referred for an advisory report to the Council of the International Civil Aviation Organisation.

Article 11

The provisions of this Agreement shall become operative from the day it is signed. The Government of Syria shall notify the Government of the United States of America of approval of the Agreement by the Syrian Parliament, and the Government of the United States of America shall consider the Agreement as becoming definitive upon the date of such notification by the Syrian Government.

Done at Damascus in duplicate in the English and Arabic languages, each of which shall be of equal authenticity, this 28th day of April, 1947.

ANNEX TO AIR TRANSPORT AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF SYRIA.

A. Airlines of the United States of America authorised under the present agreement are accorded rights of transit and non-traffic stop in Syrian territory, as well as the right to pick up and discharge international traffic in passengers, cargo, and mail, at Damascus on the following route:

The United States of America through Europe and Turkey to Syria and beyond to India: *via* intermediate points, in both directions.

B. Airlines of Syria authorised under the present agreement are accorded rights of transit and non-traffic stop in United States territory as well as right to pick up and discharge international traffic in passengers, cargo, and mail in the United States on a route or routes as may be determined at a later date from Syria *via* intermediate points to the United States, in both directions.

C. In the establishment and operation of air services covered by this Agreement and its Annex, the following principles shall apply:

1. The two Governments desire to foster and encourage the widest possible distribution of the benefits of air travel for the general good of mankind at the cheapest rates consistent with sound economic principles; and to stimulate international air travel as a means of promoting friendly understanding and good will among peoples and insuring as well the many indirect benefits of this new form of transportation to the common welfare of both countries.
2. It is the understanding of both Governments that services provided by a designated air carrier under the Agreement and its Annex shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such air carrier is a national and the country of ultimate destination of the traffic. The right to embark or disembark on such services international traffic destined for and coming from third countries at a point or points on the routes specified in the Annex to the Agreement shall be applied in accordance with the general principles of orderly development to which both Governments subscribe and shall be subject to the general principle that capacity should be related:
   (a) to traffic requirements between the country of origin and the countries of destination;
   (b) to the requirements of through airline operation; and
   (c) to the traffic requirements of the area through which the airline passes after taking account of local and regional services.

D. The contracting parties should undertake regular and frequent consultation between their respective aeronautical authorities so that there should be close collaboration in the observance of the principles and the implementation of the provisions outlined in the Agreement and its Annex, and in case of dispute the matter shall be settled in accordance with the provisions of Article 10 of the Agreement.

* * *

Note.—It is understood that the above agreement between the United States and Syria will serve as a model for similar agreements with other States.

8

TREATY OF ALLIANCE BETWEEN HIS MAJESTY IN RESPECT OF THE UNITED KINGDOM AND HIS HIGHNESS THE AMIR OF TRANS-JORDAN.[8]

LONDON, MARCH 22, 1946

Article 1

His Majesty The King recognises Trans-Jordan as a fully independent State and His Highness The Amir as the sovereign thereof.

There shall be perpetual peace and friendship between His Majesty The King and His Highness The Amir of Trans-Jordan.

There shall be established between the High Contracting Parties a close alliance in consecration of their friendship, their cordial understanding and their good relations and there shall be full and frank consultation between them in all matters of foreign policy which may affect their common interests.

Each of the High Contracting Parties undertakes not to adopt in foreign countries an attitude which is inconsistent with the alliance or might create difficulties for the other party thereto.

Article 2

Each High Contracting Party will be represented at the Court of the other High Contracting Party by a diplomatic representative duly accredited.

Article 4

Should a dispute arise with a third State, the continuance of which is likely to endanger the maintenance of international peace and security, the High Contracting Parties will, first of all, concert together to seek a solution by peaceful means as provided in Article 33 of the Charter of the United Nations.

Article 5

Should either High Contracting Party, notwithstanding the provisions of Article 4 of the present Treaty, become involved in hostilities, as a result of armed attack by a third party, the other

[8] For full text see Treaty Series No. 32 (1946).

High Contracting Party will, subject always to the provisions of Article 12 of the present Treaty, immediately come to his aid as a measure of collective self-defence. In the event of an imminent menace of hostilities the High Contracting Parties will immediately concert together the necessary measures of defence.

Article 8

1. All obligations and responsibilities devolving on His Majesty The King in respect of Trans-Jordan in respect of any international instrument which is not legally terminated should devolve on His Highness The Amir of Trans-Jordan alone, and the High Contracting Parties will immediately take such steps as may be necessary to secure the transfer to His Highness The Amir of these responsibilities.

2. Any general international treaty, convention or agreement which has been made applicable to Trans-Jordan by His Majesty The King (or by his Government in the United Kingdom) as mandatory shall continue to be observed by His Highness The Amir until His Highness The Amir (or his Government) becomes a separate contracting party thereto or the instrument in question is legally terminated in respect of Trans-Jordan.

Article 9

1. The High Contracting Parties will open negotiations for a Commercial and Establishment Agreement as soon as practicable.

2. Until the conclusion of the Agreement referred to in paragraph 1, or until the expiry of two years from the date of signature of the present Treaty, whichever is the earlier, each High Contracting Party will maintain in relation to the nationals and commerce of the other the régime applying at the date of signature of the Treaty; provided that neither High Contracting Party will extend to the nationals or commerce of the other treatment less favourable in any respect than that which he accords to the nationals and commerce of the most favoured foreign country.

3. The provisions of the second paragraph of this Article apply to the colonies, overseas territories and protectorates of His Majesty The King and the territories administered by His Majesty's Government in the United Kingdom under mandate or trusteeship.

Article 13

Should any difference arise relative to the application or the interpretation of the present Treaty, and should the High Contracting Parties fail to settle such difference by direct negotiation, the difference shall be referred to the International Court of Justice unless the parties agree to another mode of settlement.

The Editors and the members of the Editorial Committee do not hold themselves in any way responsible for the views expressed by contributors.

Editorial Communications should be addressed to the Managing Editor. Books for review should be sent care of the Publishers.